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PREFACE

LIKE the previous volumes in this series, the present issue is the joint work of the members of the Departments of Law and International Studies at the London School of Economics and Political Science. The responsibility for the various Sections is as follows:—

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International Conventions and Documents—A. B. Lyons.

We are indebted to Mrs. A. B. Lyons, B.Sc.(Econ.), for preparing the Tables of Statutes, Cases, and Statutory Rules and Orders, and to Dr. O. C. Giles for the compilation of the Index.

It is with very great regret that we have to record the death of Mr. S. H. Bailey, who for several years had contributed the Section on International Conventions and Documents. We would like to express our deep appreciation

of his contributions and our warm regard for him as a colleague.

Our thanks are due to Mr. A. M. Carr Saunders, the Director of the London School of Economics, and to the Governors of the School, whose support and generosity have made possible the publication of this eleventh issue of the *Survey*.

May 25, 1989.

London School of Economics and Political Science (University of London), Departments of Law and International Studies.

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GENERAL SURVEY

NOTWITHSTANDING a concerted effort to try and arrest the tendency of the *Annual Survey* to expand each year, it has been found impracticable to reduce the number of pages in the 1938 issue below that reached in 1937. On the contrary, eighteen pages have had to be added. The *Tort* Section is the only one that shows any substantial reduction in size. Most of the other Sections show small increases. The principal reason for this increase is that many more cases are now reported since the introduction of a new set of reports.

The two outstanding enactments of the year under review are the Coal Act and the Inheritance (Family Provision) Act. It is a sign of the times that one aspect of the former statute is discussed under *Administrative Law* and another aspect of it under *Property and Conveyancing*. Different aspects of the Inheritance, etc., Act are reviewed under *Family Law*, *Property*, *Evidence and Procedure* and *Conflict of Laws*. As the contributor of the Section on *Property* observes, both of these statutes "indicate how far away the Legislature has travelled from the nineteenth century gospel of *laisser-faire*".

Few statutory provisions are mentioned under *Constitutional Law*, the most important of them being the Eire (Confirmation of Agreements) Act. As usual there are many enactments falling to be reviewed under *Administrative Law*. Some of these reflect "the dangerous tension in international relations", and others continued "interest and progress in the social services" and "housing". The contributor laments that "the legislation regulating the conduct of industry and agriculture is expanding enormously in volume and increasing in complexity".

In addition to the two important statutes already mentioned, the *Property* Section discusses the Leasehold Property (Repairs) Act, yet another Rent Act and a lengthy consolidating Trade Marks Act. The Hire-Purchase Act is referred to under *Contract* and *Tort* and is discussed under *Mercantile Law* "as a measure of first-class importance both because of the fundamental changes which it effects in the law relating to an important type of commercial contract, and because of the social consequences which these changes are likely to have". The Holidays with Pay Act, the Road Haulage Wages Act and Young Persons (Employment) Act are the more notable measures in the field of *Industrial Law*. The important changes effected by the Administration of Justice Act and the Evidence Act are referred to in several Sections and discussed under *Criminal Law* and *Evidence and Procedure*.

In the field of *Case Law* pride of place must be given to

some of the cases discussed in the Sections on *Conflict of Laws* and *International Law*. They reflect "the disturbed state of the world" and raise such problems as the meaning of different forms of "recognition" of foreign powers and the extent of the jurisdiction of foreign sovereigns. An important case on the Official Secrets Act is reviewed under *Constitutional Law* and *Criminal Law*. There is also in the *Constitutional Law* Section the usual batch of cases involving the consideration of the British North America Act. An important local government case concerning the compensation payable on adjustment of boundaries and two cases on the disclosure of documents seem to be the most interesting in the *Administrative Law* Section. The chief interest of the 1938 cases affecting *Family Law* "lies in the interpretation and operation of the Matrimonial Causes Act, 1937. Particularly noteworthy is the number of cases on desertion". There is "a greater number than usual of cases involving the consideration of rules of administration and construction" of wills and the Courts have again had to consider problems in connection with restrictive covenants.

In the fields of *Contract* and *Tort* the year 1938 is described as "quiet" and "normal". Cases of importance on restitution and frustration are, however, discussed in the *Contract* Section, and in the *Tort* Section there are equally important cases on nuisance, breaches of statutory duties, common employment and the Law Reform Act, 1934. No cases of outstanding importance are reviewed this year under either *Mercantile Law* or *Industrial Law* and were it not for the case on the Official Secrets Act the same could be said of the *Criminal Law* Section. Under *Evidence* there are discussed cases of interest on estoppel and communications between spouses.

The *Legal History* contributor describes 1938 as having "been exceptionally productive both in publication of original sources and of general historical surveys, the latter especially in the field of Constitutional Law and History". A larger number of books—mostly new editions—are reviewed by the contributors on Property and Mercantile Law, and there seems to be the usual substantial number of new books and new editions of works on Jurisprudence, Constitutional Law and Administrative Law.

JURISPRUDENCE

CASE LAW

Re Shoesmith, [1938] 2 K. B. 637, contains interesting *obiter dicta* on the question how far the Court of Appeal is bound to follow its own decisions. The issue before the Court was whether an appeal from an order made by a Judge in chambers under the Mental Treatment Act, 1930, should go to the Divisional Court or to the Court of Appeal. In the course of a dissenting judgment Greer, L.J., said: *Stare decisis.*

> "I wish to repeat what I said in the course of the argument, that the Court has more than once, sitting as a Court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a Court sitting with a quorum of members can do the same thing. Although, as a matter of courtesy and of usual practice, this Court deems it right to follow its own decisions in earlier cases, there is no rule of law which compels it to do so."

His Lordship subsequently added that the case to which he was referring, in which a full Court overruled a previous decision, was *Wynne Finch* v. *Chaytor*, [1903] 2 Ch. 475. Slesser, L.J., agreed in principle, but with some hesitation. He said:

> "I start with the opinion expressed by Lord Ellenborough, in the case of *Moorson* v. *Kymer*, that 'it is extremely dangerous to shake the authority of decided cases', more particularly when they deal with questions of jurisdiction, although I respectfully agree with my Lord that there is no rule of law that prevents this Court, either sitting with a full complement of its members or with a quorum of its members, from revising its own decisions. Starting with that view I have great hesitation in acceding to the argument that this Court should now repudiate a jurisdiction entertained as recently as last year, notwithstanding the fact that on that occasion the point of jurisdiction was not argued."

Both these *dicta* are contrary to the rule stated in most of the text-books (see, *e.g.*, Allen, *Law in the Making*, 154;

Salmond's *Jurisprudence*, 9th ed., 231; Pollock, *A First Book of Jurisprudence*, 322), and since they are both *obiter* the point cannot yet be said to have been definitely established.

On the other hand, there has never been any doubt that the Judicial Committee can, if it so wishes, depart from its own precedents, though it will do so only reluctantly. Thus, in *Mercantile Bank of India* v. *Central Bank of India*, [1938] A. C. 287, the Board refused to follow a rule which it had itself laid down in *Commonwealth Trust* v. *Heaton*, [1926] A. C. 72.

Interpretation of statutes.

In *Re Insole's Estate*, [1938] Ch. 812, the Court of Appeal made a welcome departure from the rule of the literal interpretation of statutes. The question was whether Schedule III, Part II, para. (v) of the Settled Land Act, 1925, which permits the defrayment out of capital of the cost of "structural additions to or alterations in buildings", could be construed to cover the case of a tenant for life who erected a range of buildings, comprising glasshouses, a garage, and a chauffeur's flat, at a short distance away from the principal house. Applying the rule of literal interpretation, Simonds, J., in the Court below ([1938] Ch. 408) had held that "it is impossible to regard that as a structural addition which is not according to ordinary parlance substantially part of the same structure". The Court of Appeal, in reversing the decision, preferred an interpretation which would give the statute "a reasonable effect and one which is consistent with the ordinary practice of this country in relation to domestic architecture and groups of buildings generally". It was necessary, it was said, to interpret the section in such a way as to give it a "practical working efficacy".

LITERATURE

Books

Readings in Jurisprudence. By Jerome Hall, Professor of Law in Louisiana State University. Indianapolis: Bobbs-Merrill. xviii and 1183 pp. (London Agents: Sweet & Maxwell, Ltd.) 32s. 6d.

Teachers of jurisprudence have long felt the need for a students' source book, in a subject the materials of which are

so many and so scattered. Professor Hall's book supplies that need, being a collection of useful extracts from most of the important publicists from Plato to the present day, and, be it said, from some who are not so important. A valuable feature of the book is that extracts from foreign authors are made available in excellent translations. The editor has not, in general, supplied explanatory notes himself; instead, he has provided the necessary comment by means of further extracts from critical articles. There are also useful bibliographies at the end of each section. The volume is well indexed, but it would have been an improvement if the dates of the principal authors quoted had been included. One is tempted to quarrel with the arrangement of the material, but that would have been the case whatever arrangement had been adopted. Nevertheless, the topic of sovereignty might have been thought worthy of a separate heading: for example, the extract from Kelsen on the nature of the State is hidden away under the general heading of "formal science". In a volume of such dimensions space should have been found for at any rate a mention of Jellinek and the auto-limitation of sovereignty. We have discovered only one printing error: Grotius said "Natural Law is the dictate of Right Reason", not, of course, "or Right Reason" (p. 48).

English Law from the Foreign Standpoint. By Hans W. Goldschmidt. London: Pitman. xviii and 258 pp. 21s.

Dr. Goldschmidt has written this book with a threefold purpose: to serve as an introduction to English law for foreign readers; to present English readers with a picture of their law as it appears to a foreigner; to serve as a contribution to the literature of comparative law. It must be said that the work is rather more expository and less critical than the title would seem to indicate. Considered, however, as an exposition it is excellent. It covers every important aspect of English law, and includes chapters on Sources, on Classifications, and on Legal Science. It is accurate and it is eminently readable. Dr. Goldschmidt's book should serve as an introduction to English law not only for foreign readers, but also for English students.

The Formative Era of American Law. By Roscoe Pound. Boston: Little, Brown & Co. 188 pp.

This consists of four lectures delivered in Tulane

University, in 1936, on the occasion of the centenary of the death of Edward Livingston. It is primarily a description of the chief agencies by which the common law was adapted to American conditions during the period from the Revolution to the Civil War. But the treatment is juristic rather than historical, and natural law, legislation, judicial decision, and doctrinal writing are discussed in general, and with particular relation to a common law system. It is an addition to our literature on sources, which English jurists will read with profit. The chapter on legislation, with its penetrating discussion of the common law method of interpreting statutes, is especially worthy of attention.

Cardozo and Frontiers of Legal Thinking. By B. H. Levy. New York: Oxford University Press. xv and 315 pp. 10s. 6d.

With the death of Mr. Justice Cardozo the legal world has lost not only a great Judge but also a great jurist. This book was written before Cardozo's death, and the biographical data with which it opens were verified by Cardozo himself. The work is in two main parts. The first part consists almost entirely of a disquisition upon the various aspects of the judicial function, written by a partisan of the Realist School, the points being illustrated or introduced by means of quotations from Cardozo's judgments or writings. Those who pick up the book expecting to find there a picture of Cardozo at work will be disappointed; instead they will find a picture of a Realist at work on Cardozo. As an essay in Realist jurisprudence it will repay study, but we were left wishing that it had been a little less tendentious. It is true that Cardozo allowed himself to be called a Neo-Realist and that he was sympathetic towards the school, but that was merely one facet of his essentially catholic intellect. The remarkable thing about Cardozo was his ability to understand and sympathise with many different points of view. The second part of the book consists in well-chosen extracts from Cardozo's judgments, arranged topically. It must not be taken as a disparagement of the author's work in the first part if we say that this second part by itself makes the book worth the price.

Die Systematik des Privatrechts in Blackstone's "Commentaries on the Laws of England". By Richard Benser. Heide i. Holst. xii and 99 pp.

Even Bentham was constrained to concede that Blackstone was the first institutional writer to teach jurisprudence to speak the language of the scholar and the gentleman. That achievement was due not only to the elegance of his style, but also to the orderly arrangement of his material. For the author of this essay it is more than an arrangement, it is a "systematik", and its implications are here analysed in a fashion which we venture to think would have caused Blackstone no little astonishment. The analysis proper is preceded by short sections on the main lines of development of English law, and the life and work of Blackstone.

Discoveries in the Statute Book (originally issued under the title *Hanged by a Comma*). By E. Stewart Fay. London: Sweet & Maxwell. vii and 280 pp. 5s.

The statutes, said Sir Edward Parry, are "in language, grammar, and common-sense real *biblia-a-biblia*, unreadable and unread". But the truth is rather that the common lawyer is so much in the habit of regarding the statute as an isolated ruling adding to or altering his common law that he never stays to look at the statute book as a whole. Mr. Fay sees the statute book as the "mirror of England", in which is reflected every vicissitude of national life and policy. Moreover, he has succeeded in conveying to the reader the fascination which the statute book has for one who can read between the lines. This does not pretend to be a scholarly work; it is intended to be read by laymen. But it may also be recommended as an introductory conspectus for the student. It will at any rate teach him to see a statute in the context of its social and historical background.

Articles

On the Nature of Legal Persons. By Martin Wolff. Law Quarterly Review, Vol. LIV, p. 494.

This is a useful and scholarly survey of the chief doctrines of corporate personality, with an examination of the practical advantages of a modified fiction theory.

The Foundation of Tortious Liability. By A. L. Goodhart. Modern Law Review, Vol. II, p. 1.

Professor Goodhart examines the arguments and authorities put forward by Sir Frederick Pollock, Professor Winfield, Dr. Allen and Dr. Stallybrass in support of a theory of a single principle of general liability in tort: he comes to the conclusion that however desirable it may be to have such a general principle, it is a case of wishful thinking to say that it exists at the present time.

Law Revision. By J. Foster. Modern Law Review, Vol. II, p. 14.

The Secretary of the Law Revision Committee discusses the measure of success achieved by the two statutes which have so far resulted from the work of the Committee. He shows that in so far as those statutes have failed in their object the failure has been due to divergencies between the recommendations of the Committee and the Bills drawn up by the Parliamentary draftsmen.

A Plea for Utilitarianism. By W. Ivor Jennings. Modern Law Review, Vol. II, p. 22.

Beginning with a timely reminder of the significance of the work of Bentham for English jurisprudence, Dr. Jennings goes on to a stimulating presentation of a sociological jurist's estimate of the value of the different jurisprudential methods. He is sceptical of the worth of a conceptual jurisprudence when unleavened by sociological considerations, and links up the latter with the utilitarian principle.

The Concept of a Philosophical Jurisprudence. By Michael Oakeshott. Politica, Vol. III, p. 203.

This is a careful examination of the meaning of philosophical jurisprudence and its relation to other jurisprudential methods.

LEGAL HISTORY

The year 1938 has been exceptionally productive both in the publication of original sources and of general historical surveys, the latter especially in the field of constitutional law and history. Local record societies patiently pursue their task of publishing deeds, quarter session rolls and similar material touching their counties. A less usual type of volume comes from the Record Society of Lancashire and Cheshire, which publishes *Cheshire in the Pipe Rolls*, edited by Miss Mabel Mills and Mr. R. Stewart-Brown; the volume is of particular interest when read with the same society's *Chester County Court Rolls* and Mr. Stewart-Brown's *Serjeants of the Peace* (noticed in *Annual Survey*, 1936); the financial aspect of both those institutions figures largely in these accounts.

Select Cases in the Court of King's Bench under Edward I. Volume II. Edited for the Selden Society by G. O. Sayles.

The first volume of this valuable collection was noticed here in 1936. The present instalment contains statistics showing that the Court's business trebled in the course of the reign, and that the proportion of trespass cases rose from 58 per cent. to 77 per cent. A long essay in the introduction throws much new light upon the nature of the plea rolls, their duplicates, and subsidiary documents. For the first time, too, it is possible to study the jurisdiction of the Court and its relations with other institutions from its own records. A few precious scraps of detail throw light upon the mysterious process of getting original writs, and the part played therein by "wayfarers". Other important matters dealt with are: equitable features in the king's bench; the citation of precedents on the plea rolls; judicial powers of varying juries' verdicts of damages; jurisdiction in error, including error from Scottish and Irish Courts; the personal presence of the king in the bench, and details of its procedure. All these matters are discussed with abundant references to sources which have so far never been used by historians.

Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries. Edited for the Ames

Foundation by Bertha Haven Putnam; with a Commentary by T. F. T. Plucknett. London: Spottiswoode, Ballantyne & Co. 42s.

This volume is the first considerable collection of material on the mediæval justices of the peace to appear, and in it Professor Putnam presents the results of her thirty years' unremitting labour upon this fascinating subject. The continuous fluctuations in the scope of their commission and their statutory powers, their relations with competing commissioners (eyre, gaol delivery, assize, labourers and others), with local Courts, and especially with the king's bench, are all illustrated by a wealth of newly discovered material. So, too, are the local organisation of the justices and of the clerk of the peace and the procedure at the sessions. The commentary by the general editor of the series deals with the influence of the justices of the peace in elaborating criminal law and their attempts to introduce a newer classification of crimes (which was adopted much later by the Legislature); the new light thrown by the text upon the extent of misdemeanour during the Middle Ages; and the relations between felony, misdemeanour and civil trespass.

The Register of Henry Chichele, Archbishop of Canterbury, 1414—1443. Volume II: Wills proved before the Archbishop or his commissary. Edited by E. F. Jacob with the assistance of H. C. Johnson. Oxford University Press. 15s.

This sumptuous volume of 900 large pages is a rich treasure house of fifteenth-century material illustrating the Archbishop's probate jurisdiction at a time when the eminent Lyndewood was his official. The introduction is an excellent study of the law of wills, and raises some difficult questions: *e.g.*, whether a London citizen could devise all his lands, even those outside the city, and what part the Church took in enforcing devises of land, and the wills of married women. Most of the documents illustrate the widespread recourse to the use as a convenient machinery for making *post mortem* dispositions of land. Not the least interesting are the lawyers' wills in the volume—a chancellor, a lord keeper, a master of the rolls, two chief justices, a puisne justice, a baron, two serjeants, a recorder of London, a chief clerk of the common pleas and a keeper of the king's bench rolls should be a fair sample of the successful lawyers of the earlier fifteenth

century. As one would expect, the chancery men, being ecclesiastics, had books to dispose of (although it is curious that the lord keeper should have given his Decretals to a London church "for the information of the parishioners": p. 312). The chief justices, justice, and serjeants, the recorder and clerks, on the other hand, mention no books of any description. Bankes, B., is the only common lawyer with books, and among them were some year books (acquired from a late chief baron) which he leaves "to the use of his sons and the survivor of them, and after their death, if they have no issue likely to profit from them, the books are to be sold at the best price obtainable and the proceeds given to the poor" (p. 68). Many testators deal with lands held to their use, most generally by directing their feoffees to make legal estates, and the will of Hody, C.J., shows how this device could be used to make provision for a posthumous son. The will of Hankford, C.J., contains an elaborate device for evading both Quia Emptores and the Statute of Mortmain (pp. 291–2), and several testators regard a flock of ewes as a good investment for a charity or a widow. It would be difficult to name any other single volume containing so large a mass of varied and significant material for legal history; the modest price of fifteen shillings is out of all proportion to the real value of this handsome and illuminating work.

Treatises

A History of English Law. By Sir William Holdsworth, K.C. Volumes X, XI and XII. London: Methuen. 32s. 6d. each.

This further instalment of Sir William Holdsworth's monumental history is assured of a ready welcome. The treatment becomes ever broader as the history approaches modern times, and the present three volumes are a general survey of the eighteenth century. After an ample review of politics during the period, Volume X devotes over 200 pages to local government law, and another 200 pages to the prerogative, the royal family, councils and cabinet, and the departments of State. A long section on Parliament and its relation to the executive leads to a concluding chapter on the Courts and the liberty of the subject. Nearly half of Volume XI is devoted to relations with Scotland, Ireland, the colonies and India. Next, 100 pages on legislative

procedure lead to an analysis of eighteenth century legislation (including corn laws, combination acts, penal reform and private bill legislation). Volume XII begins with the profession and legal education, and next discusses the literature of law and equity: the detailed criticism of this vast mass of material will be of great value to subsequent workers. The volume concludes with evaluations of the work of the greater lawyers of the century. The thoroughness with which this is done can be seen from the treatments of Hardwicke (60 pages), Mansfield (96 pages) and Blackstone (50 pages). The inclusion of such matters as the old colonial policy and the work of Adam Smith is only one indication of the point of view which the whole work illustrates, namely, the need of studying legal history in close association with those political, philosophical and economic factors which accompanied the more strictly legal and technical elements in the development of the law.

The Constitutional History of Modern Britain: 1485–1937. By D. L. Keir. London: A. & C. Black. 15s.

This is the companion volume to Mr. Jolliffe's *Constitutional History of Mediæval England* noticed here last year. Like its predecessor, the treatment is chronological, special topics being treated as they arise. The distribution of interest is clearly indicated by the fact that the Tudors occupy the first quarter, and the Stuarts the second quarter, of the volume. The eighteenth century occupies 75 pages and the periods 1782—1867 and 1867–1937 each receive nearly a hundred pages. The balance of the work is therefore excellent. Although there is no bibliography, there are many short but valuable footnotes throughout the work which immediately put the reader in touch with the extensive and scattered literature of the subject. The task of covering so long a period in a single moderate sized volume is indeed formidable, and Mr. Keir has achieved conspicuous success. Plenty of significant facts and illustrative detail are given, without ever degenerating into a mere chronicle, and broad lines of development are kept clearly to the fore, without falling into the corresponding extreme of unsubstantiated generalities. Necessarily, the work keeps to the broad highway of constitutional history, and resolutely refuses to enter into side issues. The result is that when matters are

treated at all, they are treated fully enough to give readers a sound basis for further study. To the merits of learning and judgment must be added a style which is clear and unaffected. The book deserves a very warm welcome from all who are interested in this vital subject.

A Constitutional History of England: 1642—1801. By M. A. Thomson. London: Methuen. 16s.

This is the fourth of five volumes by different authors who combine to produce a synthesis of the present state of learning in constitutional history under the general editorship of Professor Treharne. The present volume (the first of the series to appear) is rather shorter than Mr. Keir's, but it deals with only half of the modern period, and so greater detail is possible. The date 1642 is rather curious as a starting point, for it compels the author to treat the *dénouement* of one story as the beginning of another. The three main sections of the work (1660—1688, 1689—1719 and 1720—1801) each consists of a dozen chapters devoted to various institutions and problems of the constitution. The treatment is therefore in the main systematic, and narrative political history has been reduced to a minimum. It is abundantly clear from Dr. Thomson's text as well as from his careful bibliography that a systematic view of English government, even on the somewhat summary scale adopted in this volume, produces results of unequal value. The author constantly reminds us that subjects of vital importance still await a pioneer. He has himself made some unobtrusive contributions in this volume, but his chapter on administrative developments (which is a subject of capital importance) records serious *lacunæ* in modern scholarship. He himself has set a good example by an important monograph on the secretaries of state, and we hope that this careful study will stimulate many young historians to enter the field of later constitutional history where work of capital importance awaits them.

Some Makers of English Law. By Sir William Holdsworth. Cambridge. 15s.

This volume is based upon the author's Tagore Lectures delivered in 1937–8 at Calcutta University, and takes the form of a short biographical history of English law. While

much of the material is available in the *History of English Law*, beginners, who are often shy of entering that imposing monument, will find their first steps in legal studies made easier by this attractive book. Although the treatment is biographical, there is plenty of legal discussion upon matters which beginners have to face; thus the chapter on Hardwicke and Eldon contains excellent illustrations of the relation of law and equity.

The Starra: their Effect on Early English Law and Administration. By F. Ashe Lincoln. Oxford University Press. 8s. 6d.

This is in substance a reprint (with some additions and changes) of the author's previous excursus, noticed here in 1933. The specifically Jewish matters are of interest, although the general background of legal history is somewhat weak.

The King's Secretary and the Signet Office in the Fifteenth Century. By J. Otway-Ruthven. Cambridge University Press. 7s. 6d.

This excellent little monograph is a good example of careful research upon a somewhat elusive subject. The signet (whose custodian was the secretary, later secretary of state) had two distinct uses: one as a warrant for the privy seal, which in turn moved the great seal, and the other as the authentication of a large and miscellaneous mass of missives. Both have constitutional significance. The council and the king were in conflict over the means to control the great seal, and Miss Otway-Ruthven's researches show the variety and importance of the missives. The use of signet missives for foreign correspondence suggests that foreign influence may have made our secretary a secretary of state in the next century. Several of the secretaries were civilians or notaries, and one of them seems to have previously held high office in the papal curia. The variety and number of signet missives seem to show the king directly intervening in a vast mass of local and personal matters, and at this moment, when the rise of the "new monarchy" was undoubtedly taking place, the activity of the signet is very significant. It was not without reason that the characteristic officer of the Tudors was the secretary. The essay concludes with a most valuable set of

lists and biographies of the secretaries and their clerks; it is pleasantly written, and very attractively produced and illustrated.

Public Order and Popular Disturbances: 1660—1714. By Max Beloff. Oxford University Press. 10s.

This welcome addition to the Oxford Historical Series approaches the subject from several different points of view. As a social phenomenon, public disorder was due to general political agitation, to dissatisfaction with the price of corn, to agrarian and labour disturbance, to opposition to the customs and excise officers, to the burden thrown upon the poor by the recoinage, and to the operations of the press gang. Lawyers will be most interested in Mr. Beloff's materials upon the machinery used for keeping the peace. He has drawn upon the state papers and also upon the records of assizes and quarter sessions, with very interesting results. The law concerning public disturbances was notoriously obscure, and Mr. Beloff has made a real contribution in showing the rich mass of material available in various classes of records; this material could be very profitably used to illustrate the practice as well as the law in dealing with public order.

The History of the Legal Deposit of Books throughout the British Empire. By R. C. Barrington Partridge. With a preface by Sir Frederic Kenyon. London: Library Association. 18s.

This is an excellent thesis which deals clearly and methodically with an enormous mass of legislation. The general history of the compulsory deposit of books is in itself interesting. It seems to have originated in France, and first took effect in England as the result of a judicious arrangement negotiated by the great Bodley himself (it might perhaps have been mentioned that an unsuccessful plan of the same sort was put forward by the navigator Sir Humphrey Gilbert as early as 1570). The basis generally adopted in later times was that deposit was a means of acquiring copyright, but in a few places (including Palestine) it is still part of the machinery of press censorship. The larger part of the book, however, is concerned with the legal requirements of deposit at present in force in all parts of the Empire, the dominions and all sorts of places from Antigua and Ashanti to Uganda

and the Virgin Islands. The research necessary to assemble all this material must have been enormous, and occasionally Mr. Partridge's skilful handling of it reveals queer problems, such as the textual doubts on a Jamaican Act (p. 239). The attempt to apply the British Copyright Act, 1911, throughout the Empire (except the dominions) raises a difficult point on which the author dissents from the editors of *Copinger on Copyright*. Government publications and local legislation are deposited under separate arrangements which are here discussed; the large quantity of legislation reproduced in the appendices will prove of service to those who have to search for such elusive material, for it indicates where it is (or is supposed to be) deposited.

Articles

The following is a list of articles (arranged roughly in chronological order of subject-matter) containing material of interest to legal historians.

Mr. Jolliffe's Reconstruction of Early Constitutional History. By Gaillard Lapsley. 23 History, 1–11.

Anglo-Saxon Charters and the Historian. By F. E. Harmer. 22 Bulletin of the John Rylands Library, 339–367.

Lehnrecht und Staatsgewalt im Mittelalter: Studien zu dem Mittleis'schen Werk. By Walther Kienast. 158 Historische Zeitschrift, 3–51.

Observations on the Open Fields. By C. S. Orwin. 8 Economic History Review, 125–135.

The Early History of English Towns. By R. R. Darlington. 23 History, 141–150.

Le vilainage anglais et le servage réel et personnel. By F. Joüon des Longrais. Recueil de la Société Jean Bodin, 199–242.

A Charter of William II to Battle Abbey. By A. J. Collins. 12 British Museum Quarterly, 122–128.

Glanvill Continued. By H. G. Richardson. 54 Law Quarterly Review, 381–399.

Le droit d'agir dans la tradition germanique et dans la tradition latine: Klage *et* actio. By M. Ricca-Barberis. 2 Recueil Lambert, 551–556.

L'amortissement des biens ecclésiastiques en Normandie. By M. Reulos. [1937] Revue historique de droit français et étranger, 782.

Les origines du droit souverain d'amortissement dans le comté de Hainaut. By N. Didier. 34 Revue d'Histoire Ecclésiastique, 487—503.

The Harvard Manuscript of Thornton's Summa. By T. F. T. Plucknett. 51 Harvard Law Review, 1038—1056.

Le bref de nouvelle dessaisine et le "commun" en Normandie à la fin du XIII^e^ siècle. By J. R. Strayer. [1937] Revue historique de droit français et étranger, 479—488.

Free Bull. By George C. Homans. 14 Review of English Studies, 447—449.

Origin of the Prescriptive Duty to Fence. By Glanville L. Williams. 54 Law Quarterly Review, 405—413.

Three English Documents relating to Francis Accursius. By G. L. Haskins. 54 Law Quarterly Review, 87—94.

Francis Accursius: a New Document. By George L. Haskins. 18 Speculum, 76—77.

Shelley's Ghost. By A. D. Hargreaves. 54 Law Quarterly Review, 70—77.

English Students at Ferrara in the Fifteenth Century. By R. J. Mitchell. 1 Italian Studies, 75—82.

Responsibility for Piracy in the Middle Ages. By Edward Lewis. [1937] Journal of the Society of Comparative Legislation, 77—89.

Nulla pœna sine lege. By Jerome Hall. 47 Yale Law Journal, 165—193.

L'idée de représentation dans les œuvres de Guillaume d'Ockham. By Georges de Lagarde. [1937] Revue historique de droit français et étranger, 756—758.

The Development of Negotiable Instruments in Early English Law. By Frederick K. Beutel. 51 Harvard Law Review, 813—845.

A Parliamentary Debate of the Mid-Fifteenth Century. By A. R. Myres. 22 Bulletin of the John Rylands Library, 388—404.

Le droit du patronage en Normandie du XI^e^ au XV^e^ s. By G. Mollat. 34 Revue d'Histoire Ecclésiastique, 21—69.

Some New Paston Documents. By Curt F. Bühler. 14 Review of English Studies, 129—142.

The Medieval Under-Clerks of Parliament. By A. F. Pollard. 16 Bulletin of the Institute of Historical Research, 65—87.

Notes on a Pynson Volume [i.e., the first edition of the Old Tenures]. By Curt F. Bühler. 18 The Library, 261—267.

The Life of Christopher St. German. By Pearl Hogrefe. 18 Revue of English Studies, 398—404.

Law French. By Theobald Mathew. 54 Law Quarterly Review, 358—369.

Dr. Bonham's Case. By Samuel E. Thorne. 54 Law Quarterly Review, 543—552.

Præmunire and Sir Edward Coke. By Samuel E. Thorne. 2 Huntington Library Quarterly, 85—88.

The Doctrine of Separation of Powers in Seventeenth-Century Controversies. By Max Radin. 86 University of Pennsylvania Law Review 842-867.

The Admiralty—IV. By Sir Oswyn A. R. Murray. 24 Mariner's Mirror, 101—105.

A propos de registres de marguilliers. By C. R. Cheney. 34 Revue d'Histoire Ecclésiastique, 801-803.

L'interprétation des lois (Statuts). By T. F. T. Plucknett. 1 Recueil Lambert, 434—449.

Acts of Bankruptcy: a Medieval Concept in Modern Bankruptcy Law. By Israel Treiman. 52 Harvard Law Review, 189—215.

The Stage and the Authorities. By Alfred Jackson. 14 Review of English Studies, 53—62.

Judicial Censorship of Obscene Literature. By Leo. M. Alpert. 52 Harvard Law Review, 40—76.

La législation dans la période de formation du droit américain. By Roscoe Pound. 1 Recueil Lambert, 404—420.

Inevitable Accident as a Defence in Trespass. By Joseph Gold. 21 Bell Yard, 8—41.

Changing Conceptions of Property in Law. By Francis S. Philbrick. 86 University of Pennsylvania Law Review, 691—732.

Evolution of the British Building Society. By Herbert J. G. Bab. 9 Economic History Review, 56—68.

La législation industrielle en Angleterre au cours des 50 dernières années. By W. A. Robson. 3 Recueil Lambert, 455—468.

CONSTITUTIONAL LAW

LEGISLATION

Prerogative writs. 1 & 2 Geo. 6, c. 69.

Section 5 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, provided for the making of new rules of the Supreme Court governing the issue of the prerogative writs of *mandamus*, *prohibition* and *certiorari*, and, in particular, providing for the abolition of the procedure for a rule *nisi*. That section is now repealed by section 10 of the *Administration of Justice (Miscellaneous Provisions) Act*, 1938, and section 7 of this statute enacts that those prerogative writs shall no longer be issued by the High Court. They are replaced by Orders of the Court, to be called respectively Orders of Mandamus, Orders of Prohibition, and Orders of Certiorari. No return is to be made to any such order, and no pleadings in prohibition are to be allowed, but the order is to be final, subject only to any right of appeal. (The procedural aspects of these provisions are dealt with in the Section on Procedure.)

Quo warranto.

By section 9 of the *Administration of Justice (Miscellaneous Provisions) Act*, 1938, informations in the nature of *Quo Warranto* are abolished. Henceforth, where a person acts in an office in which he is not entitled to act, and where prior to the commencement of this Act an information of *Quo Warranto* would have lain against him, the High Court is empowered to grant an injunction restraining him from so acting, and may also, if the case so requires, declare the office to be vacant.

Agreements with Eire.

On April 25, 1938, the representatives of the Governments of the United Kingdom and Eire signed three agreements: a trade agreement, a financial agreement, and an agreement for the revocation of Articles 6 and 7 of the Articles of Agreement of 1921. The last of these is constitutionally the most significant, for it provided for the transfer to the Government of Eire, not later than December 31, 1938, of all Admiralty property and rights, including armaments and ammunition, in the ports of Berehaven, Cobh (Queenstown), and Lough Swilly. The reservation of Admiralty rights in those ports by the 1921 treaty has always been regarded by Mr. De Valera as objectionable in that they might prejudice the neutrality

of Eire in a war between the United Kingdom and a foreign power. In return for the surrender of those rights the Government of Eire has not given any formal undertaking not to permit any foreign power to use its territory for the purposes of attack on this country; but there is an informal statement of Mr. De Valera to that effect.

By the terms of the Financial Agreement, the Government of Eire undertook to pay to the Government of the United Kingdom, on or before November 30, 1938, the sum of £10,000,000 sterling, by way of a final settlement of all financial claims by either Government against the other existing before the date of the agreement. Certain claims, including payment for agency services and "ordinary intergovernmental transactions", for damage to property under the Agreement of December 3, 1925, and certain miscellaneous matters, were excepted. Furthermore, the United Kingdom Government undertook to abolish customs duties chargeable under the Irish Free State (Special Duties) Act, 1932, and the Government of Eire undertook reciprocally to abolish emergency customs duties imposed upon United Kingdom goods at the same time. The Trade Agreement is to come into force on a date to be mutually agreed between the two Governments, and is to remain in force for a period of three years from that date. Unless six months' notice of termination has been given by either Government before the expiry of that period, it is to remain in force until the expiry of six months from a date upon which notice of termination is given.

1 & 2 Geo. 6, c. 25.

The Eire (Confirmation of Agreements) Act, 1938, was passed in order to enable His Majesty's Government to implement those agreements, and in section 1 the style of Eire is confirmed as regards that territory "which, in accordance with the provisions of the Irish Free State (Agreement) Act, 1922, and the Irish Free State Constitution Act, 1922, was required to be styled and known as the Irish Free State".

Election polling hours. 1 & 2 Geo. 6, c. 59.

The *Local Government (Hours of Poll) Act*, 1938, makes possible the extension of the polling hours, at county borough and borough council elections, till nine o'clock, where proper notice is given by a nominated candidate or candidates.

Dominica Act, 1938. 1 & 2 Geo. 6, c. 10.

The *Dominica Act*, 1938, is a short Act providing for the separation of Dominica from the colony of the Leeward Islands, and constituting it as a separate colony. The Act is to be brought into force on an "appointed day" to be fixed

by Order in Council. Thereafter, His Majesty may by Order in Council make such provision as is thought fit for the government of Dominica, and may delegate the legislative power to any authority constituted for the purpose by Order in Council or otherwise, and without prejudice to the legislative competence of His Majesty in Council, notwithstanding such delegation. An Order in Council may also determine which, if any, existing laws are to remain valid for Dominica, notwithstanding its separation from the Leeward Islands, and may adapt or modify such laws, including the Leeward Islands Act, 1871. As from the appointed day, Dominica is to be a West Indian Colony to which the West Indian Court of Appeal Act, 1919, shall apply.

Orders in Council.

The *Northern Rhodesia (Legislative Council) Amendment Order in Council*, 1938 (S. R. & O., No. 1648), modifies the composition of the Legislative Council of Northern Rhodesia. It is to consist of the Governor as President, five *ex officio* Members, Nominated Official Members not exceeding three in number, one Nominated Unofficial Member to represent the interests of the Native Community, and seven Elected Unofficial Members.

The *Swaziland (Privy Council Appeals) Order*, 1938 (S. R. & O., No. 1566), provides for the hearing by the Judicial Committee of appeals from the new High Court of Swaziland. The *Bechuanaland Protectorate (Privy Council Appeals) Order*, 1938 (S. R. & O., No. 1604), makes similar provision in respect of the High Court of Bechuanaland.

CASE LAW

Official Secrets Acts.

Lewis v. *Cattle*, 54 T. L. R. 721, is a case which has already gained considerable notoriety, and has produced a powerful agitation for the reform of the Official Secrets Acts. A document containing certain information was circulated by one police force to certain other police forces, and no instructions were given that it might be communicated to the press. The appellant, a journalist, inserted in a newspaper a paragraph embodying the information. On refusing to disclose the source of his information he was charged under section 6 of the Official Secrets Act, 1920, which provides that a person who fails to disclose, on demand by a chief inspector of police, or superintendent, or other officer of police not below the rank of inspector appointed

by a chief officer for the purpose, or any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty, any information in his power relating to an offence or suspected offence under the Official Secrets Acts, shall be guilty of a misdemeanour. The appellant was convicted by the Stockport justices, and the appeal came before the Divisional Court by way of case stated. The "suspected offence" in this case was one under section 2 of the Act of 1911, which provides that if any person having in his possession or control any information entrusted in confidence to him by any person holding office under His Majesty, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under His Majesty, or as a person who is or has been employed under a person who holds or has held such office, communicates the information to any person other than a person to whom he is authorised to communicate it, he shall be guilty of a misdemeanour. It was contended on behalf of the appellant that a police officer is not a person holding office under His Majesty. The justices had in fact found that a police officer is a servant of the Crown, which is a very different matter, and the Lord Chief Justice elected to treat this finding as a "slip of the pen". However, the conviction was affirmed, for, said Lord Hewart:

> "In my opinion it is true to say that every police officer in England and Wales, whether he be a member of the Metropolitan police force, or a member of the police force of a county, city, or borough, holds the office of constable, and within his constablewick has all the duties and rights conferred by common law or statute on the holders of that office. He is required to take an oath of office, and his primary duty is to preserve the King's peace. It follows that a police officer is a person who holds office under His Majesty within the meaning of the Official Secrets Acts."

These are the only reasons given in what seems to be a very short judgment for so important a case, and would hardly seem to be in accord with the rule of the strict interpretation of penal statutes, which rule was not mentioned.

Public Authorities Protection Act, 1893.

There has been the usual crop of cases involving section 1 of the Public Authorities Protection Act, 1893, which provides that "where any action, prosecution, or other proceeding is

commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament", then the action must be brought within the limited period of six months. It was pointed out by Lord Buckmaster, L.C., in the leading case of *Bradford* v. *Myers*, [1916] 1 A. C. 242, that a restricted interpretation was necessary. Public authorities did not enjoy the benefit of the statute in respect of an act merely because that act was within their power; "it is because the act is one which is either in the direct execution of a statute, or in the discharge of a public duty, or in the exercise of a public authority. I regard these words as meaning a duty owed to all the public alike, or an authority exercised impartially with regard to all the public." This *dictum* was relied upon by Branson, J., in his decision in *Hawkes* v. *Torquay Corporation*, 61 Ll. L. R. 289. This was a claim for personal injuries. Whilst buying tickets at the box office of the Torquay pavilion, a poster frame became detached and fell on to the foot of the plaintiff. The defendants pleaded the Public Authorities Protection Act. It appeared that they erected and managed the pavilion under powers conferred by Act of Parliament. But the powers were merely permissive. There was nothing in the Act to compel the defendants to erect the pavilion, nor to compel them to carry it on once erected. Accordingly, it was quite impossible, said his Lordship, to extend the Act of 1893 to cover such purely voluntary acts.

In *McManus* v. *Bowes*, [1938] 1 K. B. 98, the Visiting Committee of a mental hospital successfully pleaded the Act of 1893 as a defence to an action for wrongful dismissal. The plaintiff had been appointed Assistant Medical Officer to the hospital under the provisions of the Lunacy Act, 1890. The Visiting Committee decided that it was not in the best interests of the hospital that he should continue to hold this post, and he was, accordingly, dismissed with three months' notice and salary. He now claimed (*inter alia*) damages for wrongful dismissal, and the return of certain superannuation payments. In respect of both claims the defendants successfully pleaded the Act of 1893, and the decision was upheld by the Court of Appeal. With regard to the claim for wrongful dismissal the relevance of the Public Authorities Protection Act was said to depend upon the answer to the question whether the contract of service was one of the

voluntary character referred to in the *Bradford Case*, or whether it was "directly statutory" not by reason of the contract, but by reason of the operative language of the Lunacy Act. It was found that on the true construction of the Lunacy Act the case fell within the latter class, and that, therefore, the Act of 1893 was applicable. The appointment and the dismissal were in direct execution of the statute itself. Therefore, if inadequate notice had been given, that was a neglect, or default, in the intended execution of an Act of Parliament. With regard to the claim for the return of superannuation payments, it was found that the Minister of Health had decided in 1930 that the plaintiff was not entitled to a pension, and from that moment he became entitled under section 10 of the Asylum Officers' Superannuation Act, 1909, to have returned to him the aggregate amount of his contributions under the Act. Thus, the neglect to repay those contributions was a neglect to perform an act which an Act of Parliament required the local authority to do. Accordingly, the Act of 1893 applied, and the action, not having been brought within the limited time, must fail.

In *Greenwood* v. *Atherton*, [1938] 4 All E. R. 686, the plaintiff was a small boy who was injured at school during a recreation period, by the swinging-to of a pair of iron gates. He sued the headmistress and the managers of the school for negligence. The school was a "non-provided" school, which, under the Education Act of 1921, received a grant, and was a "public elementary school" within the meaning of the Act. It was held by the Court of Appeal that the managers were a statutory body acting in the execution of the Education Acts, and that the duty of supervision was one owed to all the children who attended the school. Accordingly, the Public Authorities Protection Act applied, and the action must fail, not having been brought within the limited period. The claim against the headmistress likewise failed as she was acting as the servant of the managers.

Canada. Social credit legislation.

Even a cursory reading of sections 91 and 92 of the British North America Act, 1867, will reveal that there are matters which *prima facie* come within both sections. In such a case the true test of whether legislation is within the competence of the Dominion or within the competence of the Provinces is to be found not in the subject-matter of the legislation, but in the purpose which it is designed to serve.

That principle is well illustrated by the decision of the Judicial Committee in *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada*, 55 T. L. R. 65, where they were called upon to consider the validity of certain social credit legislation proposed by the Province. Three Bills were involved, entitled respectively "an Act respecting the Taxation of Banks", "an Act to Amend and Consolidate the Credit of Alberta Regulation Act", and "an Act to Ensure the Publication of Accurate News and Information". All three had been held invalid by the Supreme Court of Canada. On appeal the Board refused to deal with the last two as their operation depended upon the continued existence of certain institutions which had in fact ceased to exist, and hence had no relation to existing rights. Accordingly, the appeal proceeded in respect of the Taxation of Banks Bill alone. This Bill was expressed as applying to every corporation or joint stock company, other than the Bank of Canada, incorporated for the purpose of doing banking or savings bank business and transacting such business within the Province. It purported to impose upon such banks an additional tax in the form of an annual tax of ½ per cent. on paid-up capital, and 1 per cent. on the reserve fund and undivided profits. The tax was declared to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province. It was argued by the appellants that this Bill was *intra vires* the Province by reason of section 92 (2) of the British North America Act, 1867, being "direct taxation within the Province in order to the raising of a revenue for Provincial purposes". However, the Board had no difficulty in agreeing with the Supreme Court that the Bill was *ultra vires*. The mere fact that the revenue of the Province would be increased by a smaller or greater amount did not alone justify a highly selective measure of this kind as coming within section 92. It was necessary to have regard to the effect and purpose of the legislation to see whether it was truly "*in order* to the raising of a revenue", for it was well established that it was not competent for the Dominion or a Province, under the guise or pretence or in the form of an exercise of its own powers, to carry out an object which was beyond its powers and a trespass on the exclusive powers of the other. The present Bill was aimed at banks alone, and if it had been designed purely for the purpose of raising a revenue it would hardly have imposed so extraordinary a burden upon these institu-

tions alone. Moreover, it had been shown that the operation of the tax would in fact be prohibitive. Accordingly, there could be no doubt that the Bill was not for the raising of a revenue but was part of a legislative plan to prevent the operation within the Province of banking institutions authorised to conduct their business there by the Dominion Parliament under its powers conferred by section 91. Hence, the Bill must be *ultra vires* the Provincial Legislature.

British Columbia. Marketing legislation.

The validity of certain British Columbian marketing legislation was upheld by the Privy Council in *Shannon and Others* v. *Mainland Dairy Products Board*, [1938] A. C. 708. The appellants were dairy farmers affected by a milk marketing scheme approved by the Lieutenant-Governor in Council under the Natural Products Marketing (British Columbia) Act, 1936. In pursuance of that Act the Lower Mainland Dairy Products Board, the respondent in this case, was constituted. The appellants asked for a declaration that the Act was *ultra vires* the Provincial Legislature, and that they were, therefore, under no obligation to obtain licences from the Board, and further claimed an injunction restraining the Board from interfering with them. Their case rested on three grounds: (i) it was urged that the Act encroached upon the power of the Dominion under section 91 (2) of the British North America Act, 1867, to regulate "trade and commerce"; (ii) that it also encroached upon section 91 (3), namely, the Dominion power of raising money by any mode or system of taxation; (iii) that, without constitutional authority, it delegated legislative power to the Lieutenant-Governor in Council. The Judicial Committee dismissed the appeal, finding against the appellants on all three grounds. In regard to (i), it was said by Lord Atkin that it was sufficient that the Act was confined to regulating transactions which took place wholly within the Province, and came therefore within the powers of the Province under section 92 of the British North America Act. The operation of the Act of 1936, on a reasonable interpretation, was confined to natural products situated within the Province, and the transportation of such products within the confines of the Province. The "trade and commerce" clause of section 91 did not give the Dominion power in respect of trade or business so far as that trade or business was confined to the Province. It followed that to the extent that the Dominion was forbidden to regulate trade within the Province, the Province itself had

the power under its legislative powers over property and civil rights within the Province. Applying the "pith and substance" test to the present Act, it was an Act to regulate business entirely within the Province, and was, therefore, *intra vires* the Province.

With regard to the objection that the licensing system under the Act encroached upon the Dominion powers of taxation under section 91 (3) of the British North America Act, their Lordships did not consider it necessary to support the licensing system by reference to the taxation powers of the Province in sections 92 (2), 92 (9) and 92 (16). If the regulation of trade within the Province had to be held valid, the ordinary method of regulating trade, namely by a system of licences, must also be admissible. A licence merely involved a permission to trade subject to compliance with specified conditions. A licence fee, though usual, was not essential. But if licences were granted, there appeared to be no objection to the charging of fees in order either to defray the costs of administration or to increase the general funds of the Province, or both. The licensing system could also be supported on the ground that the fees were charged in respect of services rendered by the Province under its powers conferred by sections 92 (13) and 92 (16).

As regards the third point, that the Provincial Legislature might not delegate legislative powers to the Lieutenant-Governor in Council, that objection was subversive of the rights which the Provincial Legislature enjoyed when dealing with matters which fell within its constitutional legislative powers. Within its appropriate sphere, the Provincial Legislature was as sovereign as any other Parliament, and so, like any other sovereign Legislature, it must be allowed to delegate powers which fell within its sphere of legislative authority. Cf. *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada*, [1937] A. C. 377, and *Annual Survey*, 1937, p. 32.

British North America Act, ss. 96, 99 and 100.

Toronto Corporation v. *York Corporation*, [1938] A. C. 415, was a case involving an interpretation of sections 96, 99 and 100 of the British North America Act, 1867, in relation to administrative bodies. In 1916 the York Corporation had entered into an Agreement with the Toronto Corporation whereby the latter agreed to supply the former with water at a certain rate, and that Agreement was confirmed by an Ontario statute. In 1936 the Ontario Legislature passed the

Township of York Act, which provided (*inter alia*) that notwithstanding the above Agreement, either party might from time to time apply to the Ontario Municipal Board for the alteration of the rates charged for the supply of water, or to settle any differences arising between the parties as to the construction of the Agreement, or any matters relating to the Agreement, and that the Board should have jurisdiction to vary and to fix the rates, its decision being conclusive and not subject to appeal. The Ontario Municipal Board had been constituted under an Act of the Ontario Legislature of 1932. In pursuance of the Act of 1936 the York Corporation made an application to the Board for a variation of the rate, and the Board proceeded to make an Order directing the Toronto Corporation to make discovery on oath of certain documents, and authorising the representatives of the York Corporation to enter upon and inspect the waterworks system belonging to the Toronto Corporation, and directing their Commissioner of Works to submit to examination upon oath. The Toronto Corporation now questioned the validity of that Order. The appellants rested their objection to the Order upon three grounds: (i) it was said that the Board was invalidly constituted as being a Superior Court constituted in contravention of sections 96, 99 and 100 of the British North America Act; (ii) in any case, the power to make the Order in question was one which could only be exercised by such a Court; (iii) the Act of 1936 was invalid as purporting to vest the jurisdiction of a Superior Court in the Municipal Board.

The first question, said Lord Atkin, touched a matter of first importance to the people of Canada. According to the Constitution, legislative power in relation to the constitution, maintenance, and organisation of Provincial Courts of Civil Jurisdiction was confided to the Provinces, but the independence of the Judiciary was protected by sections 96, 99 and 100 of the British North America Act, which provided respectively that the Judges of the Superior, District and County Courts should be appointed by the Governor-General, that they should hold office during good behaviour, and that their salaries should be fixed and provided for by the Parliament of Canada. If, then, the Municipal Board was a Superior Court, it followed that it was invalidly constituted, for the Act of 1932 which established the Board observed none of those provisions. But their Lordships were of the opinion

that, applying the "pith and substance" rule, the Board was an administrative body. It was true that it was endowed by the Act with certain functions which were undoubtedly those of a Superior Court, and to that extent it must be regarded as having been invalidly constituted. But those portions of the Act were clearly severable, and the Act was invalid only in so far as it purported to constitute the Board as a Court of justice analogous to a Superior Court, whilst not complying with the requirements of the British North America Act. Therefore, the objection to the validity of the Board as such failed. With regard to (ii), it was decided that the powers of examination, inspection and the discovery of documents, even though couched in terms similar to those of a Court of justice, were not inconsistent with the powers of an administrative body whose duties may be to ascertain the facts with which it is called upon to deal. In regard to (iii), the first part of the Act of 1930 which purported to confer a judicial function on the Board was clearly inoperative; but the second part related to an administrative function and was severable. Thus, the particular Order complained of was a valid Order, and the appeal must be dismissed.

Malta. Prerogative power of legislation.

Sammut v. *Strickland*, [1938] A. C. 678, was a case brought to test the validity of a customs duty imposed under Ordinance No. 27 of 1936 upon goods imported into Malta. The Ordinance was enacted by the Governor of Malta in pursuance of powers purported to have been conferred upon him by the Malta Letters Patent of August 12, 1936. The validity of these powers was contested by the respondent. It appeared that in 1921 Letters Patent were issued, establishing in Malta a Legislature consisting of a Senate and Legislative Assembly; certain matters were reserved, and provision was made for the suspension of the constitution in time of emergency. By the Letters Patent of 1936 His Majesty revoked the Letters Patent of 1921, and the government of the colony was placed in the hands of the Governor, who was given the power to "make laws for the peace, order, and good government of Malta". It was under these powers that the particular customs Ordinance was issued. It was not disputed that the Ordinance fell within the powers purported to be conferred by the Letters Patent of 1936, but it was contended by the respondent that there was at that time no power in the Crown to provide for the government of Malta

by Letters Patent or Order in Council, nor to confer upon the Governor any legislative power, except perhaps in matters expressly reserved by the Letters Patent of 1921. The case of the respondent rested on two main grounds, both of which were rejected by the Privy Council in allowing the appeal.

In the first place, it was argued that the Crown never had the right to legislate for the colony, since, on account of the peculiar method by which it was acquired, it was not to be regarded as a ceded or conquered colony but as being in a position analogous to that of a settled colony. It was true that the Crown has extensive powers of legislation even in a settled colony, under the British Settlements Act, 1887, but that Act did not apply to Malta. The argument was based on the undoubted historical fact that Malta was acquired not by a cession from a foreign Power, but by virtue of a voluntary cession on the part of the people of Malta. Thus it was sought to draw a distinction of substance between two different kinds of cession: a cession from a foreign Power, and a cession by the desire and consent of the inhabitants. Their Lordships observed that such a division was entirely novel and could not be supported from any authority, and must therefore be rejected.

The second argument put forward for the respondent was based on an interpretation of *Campbell* v. *Hall* (1774), 1 Cowp. 204. It was suggested that that case decided that where the Crown, though entitled in the first instance to legislate for a colony by the Royal Prerogative, has subsequently conferred representative institutions on the inhabitants, and has failed to reserve, not only the power to revoke the Letters Patent or Orders in Council establishing those institutions, but also the power of resuming legislation by virtue of the Prerogative, the Crown has irrecoverably lost that power of prerogative legislation. Even where it may validly revoke the instruments conferring representative institutions, that which is put in the place of those institutions must derive its authority from an Act of the Imperial Parliament. In the present case it could not be denied that the Letters Patent of 1921 were validly revoked, on account of the operation of the Malta (Letters Patent) Act, 1936, but that Act had not operated to validate the portion of the Letters Patent of 1936 by which the Crown purported to resume the power of prerogative legislation. The contention in effect was that since August 12, 1936, Malta had been

without a constitution. A superficial reading of *Campbell* v. *Hall* would appear to support that view: but in fact, as Lord Maugham pointed out, that case was concerned with an entirely different situation. There the Crown, after establishing representative institutions in Granada, had attempted, whilst those institutions were in existence, to exercise the prerogative power of legislation concurrently, even though no such right had been reserved. Thus, *Campbell* v. *Hall* does not decide that when a grant of representative institutions has once been made the Crown is immediately and irrevocably deprived of its right to legislate by Letters Patent or Order in Council unless there is an express reservation of that right. What it does decide is that "such a grant without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist". It is true that such a grant can only be revoked where the right of revocation has been expressly reserved; but where the grant has been lawfully revoked the Crown may resume its right of legislation by prerogative powers.

LITERATURE

First Report from the Select Committee on the Official Secrets Acts. H.M. Stationery Office. 1s. 0d.

On June 27, 1938, Mr. Duncan Sandys made his now celebrated statement in the House of Commons asking for the guidance of Mr. Speaker on a matter touching the Official Secrets Acts and the privileges of Members of the House. It appeared that Mr. Sandys had drafted a parliamentary question which revealed a knowledge of highly secret information, and had sent it to the Secretary of State for War, inviting him to deny the facts stated therein if he could. As a result Mr. Sandys was interviewed, not, as would have been the usual course, by the Secretary of State, but by the Attorney-General, who pointed out that the disclosure of the information was a breach of the Official Secrets Acts, and invited him to reveal the source of his information. This Mr. Sandys was not willing to do, and the Attorney-General then read over to him section 6 of the Act of 1920, which imposes a maximum penalty of two years' imprisonment in respect of such a refusal. Mr. Sandys not unnaturally interpreted this as a threat, and raised the matter in the House.

The present Select Committee was then appointed by a resolution of the House to inquire into the substance of Mr. Sandys' statement and the action of the Ministers concerned, and "generally into the question of the applicability of the Official Secrets Acts to Members of this House in the discharge of their parliamentary duties". Meanwhile, a further question had arisen by reason of the summoning of Mr. Sandys, in his capacity as an officer of the Territorial Army, to appear for the purpose of giving evidence before a court of inquiry set up by the Army Council. After Mr. Sandys had raised this further question in the House in a statement on June 29, the question was referred to the Committee of Privileges, which reported that there had been a breach of privilege, though not making clear what that privilege was. However, it appeared from the debate in the House on July 18 that there had been a misunderstanding of the facts. The Prime Minister's motion to refer the question of the issuing of the summons to the Committee of Privileges had spoken of the "action of the military court of inquiry", whereas the court had not yet met when Mr. Sandys raised the matter in the House. Moreover, it appeared that the members of the Committee of Privileges had been under the impression that the summons had been sent by the military court. After some debate the House passed a resolution reaffirming that the sending of the summons was a breach of privilege, but instructing the Select Committee to inquire into and report upon the circumstances in which the summons was issued.

This first report from the Select Committee is confined to the inquiry into the substance of Mr. Sandys' statement, the action of the Ministers concerned, and the circumstances in which the summons was issued. The larger question of the application of the Official Secrets Acts to Members is left to be dealt with in a subsequent report. The report begins by pointing out that these are matters which "directly concern every individual citizen whose right it is in the last resort to have his grievances ventilated by speech and question on the floor of the House of Commons", and the inquiry was therefore concerned with "questions of freedom of speech and the protection of the individual from pressure by the executive, which lie at the very roots of the democratic system". There follows an exposition of the events leading up to Mr. Sandys' statement of June 27, and the conduct

of the Ministers concerned is examined in the light of "the ordinary standards of reasonable conduct and the accepted relationship between Ministers of the Crown and Members of the House of Commons".

With regard to the circumstances in which the summons to appear before the military court was issued, it appeared that it was dispatched at the order of the G.O.C.C. of the Eastern Command, and the Committee points out that no exception could be taken to this action. Once it had been decided to set up a court of inquiry it followed as a matter of course that the attendance of all material witnesses should be secured. The fault lay in the failure of the Army Council to postpone altogether the assembling of the court after the proceedings in the House on June 27. For that failure the Secretary of State for War must take full responsibility. The circumstances in which that failure was brought about form remarkable reading. They reveal the astonishing situation of two Generals spending a quarter of an hour discussing a very simple issue, at the end of which time the one had completely failed to convey his meaning to the other.

Attention should also be drawn to the draft report which commanded the assent of a minority of the members of the Committee, and which is also printed in this blue book: it is a much more forthright document than the report adopted by the majority.

Outlines of Local Government of the United Kingdom and the Irish Free State. By J. J. Clarke. Thirteenth edition. London: Pitman. x and 365 pp. 5s.

Outlines of Central Government. By J. J. Clarke. Ninth edition. London: Pitman. xii and 420 pp. 6s.

These are not books to read but books to refer to. The volume on local government will continue to serve as a *vade mecum* for members of local authorities; indeed, it even includes a section of hints for newly elected members. It is a mine of methodically tabulated information on almost any topic having any conceivable connection with local government. A certain amount of information might have been omitted with advantage. Thus, it is extremely useful to have the legislation and organisations relating to unemployment tabulated in six pages, but it was surely a little naïve to

tabulate the causes of unemployment in three lines! However, the sin is expiated in the succeeding paragraph by a miniature review of the appropriate blue book. The volume on central government is intended to be similar in form, but the result looks uncommonly like a cram book, and to that extent its usefulness as a book of reference is diminished, for the effort to produce a book which will appeal to a certain type of student has resulted in scrappy and dogmatic statements on matters of theory which will not admit of such treatment. However, these are handy little books. They reflect the encyclopædic knowledge of their author, and are cheap at the price. Both have useful bibliographies and good indexes.

The Statute of Westminster and Dominion Status. By K. C. Wheare. Oxford University Press. xvi and 328 pp. 10s.

This is a study of the effect of the Statute of Westminster upon Dominion status. The book necessarily opens with a discussion of the nature of laws and conventions, for, as Dr. Wheare points out, the first significant fact about the Statute is that it is a statute. It is this fact which has seemed to many to constitute a fundamental objection to it, believing as they do that it is contrary to the tradition and experience of the British Constitution to embody vital changes in the form of a rigid law. That view is subjected to a penetrating analysis, and it is pointed out that whether a change is to be embodied in statute or in convention must depend largely upon whether it is one which must be recognised by the Courts in order to be realised, or whether it is one which can be effected independently of the Courts. The burden of this work is that the Statute was necessary in order to render practically effective a conception of Dominion status which had already been recognised in principle. Two chapters are devoted to an exposition of Dominion status in 1926, followed by a special section on the peculiar position of the Irish Free State. In the remaining chapters, the detailed implications of the Statute in respect of the United Kingdom Parliament, the respective Dominions, and the Monarchy are dealt with. An appendix contains the relevant texts. The author has combined profundity of thought with clarity of expression, a combination which is all too rare, and

it needs no gifts of prophesy to forecast that this will become the standard work on the subject.

The Dominions as Sovereign States. By A. B. Keith. London: Macmillan. xlv and 769 pp. 25s.

Believing that no further radical changes in Dominion status will appear for some time, Professor Keith has restated and brought up to date the doctrines set forth in his earlier works, *The Sovereignty of the British Dominions* and *The Constitutional Law of the British Dominions*. The result is a comprehensive and authoritative statement, embracing a vast amount of material, of the legal position of the members of the British Commonwealth to-day. The work is divided into two main parts dealing respectively with the sovereignty of the Dominions and the government of the Dominions. The first part begins with an historical survey, followed by a discussion of the place of the Dominions in international law, the effect of the Statute of Westminster on the internal relations of the Commonwealth, and the character of inter-Imperial relations. The second and larger portion is concerned with the detailed implications of Dominion status. This section is arranged not under the heads of the various members of the Commonwealth, but topically. Thus, for example, all the rules governing the holding of judicial office throughout the Commonwealth are to be found gathered together in one section. An astonishing variety of topics are dealt with. Thus even the reader interested in the rules governing the granting of medals will find them dealt with in the appropriate section. Professor Keith is to be congratulated on producing yet another work which serves at once as a readable text-book and a book of reference.

The Law of the Indian Constitution. By M. Ramaswamy. With a foreword by A. Berriedale Keith. London: Longmans, Green & Co. xlii and 450 pp. 21s.

This is an important addition to the considerable literature which has already grown up around the Government of India Act, 1935. Believing that the day is not far distant when India will have acquired Dominion status, and that the Act of 1935 is merely a stepping stone in this progress, the author devotes a long introduction to a discussion of the meaning

of Dominion status, and the effect of the Statute of Westminster. This is followed by a most valuable sketch of the history of British rule in India from 1600 to 1935, special attention being paid to the Montague-Chelmsford reforms. There is a chapter devoted to the special position of the Indian States, and here perhaps a little too much ingenuity is expended in attempting to apply jurisprudential labels, instead of admitting at the outset that the relationship of paramountcy is *sui generis* and one which can only be described and not defined. The substantial part of the work is, of course, that which is concerned with the legal interpretation of the Act. Here, rightly and inevitably, the author has drawn largely upon the experience of Australia, Canada, and the United States. Indeed, the only treatment possible at this stage is to point out the problems involved and the material which is available for their solution. There is a postscript on the new Constitution of Eire, which is interesting but hardly relevant. The index should have been fuller for a book of this kind.

Lectures on the American Constitution. By Sir Maurice Amos. London: Longmans, Green & Co. ix and 178 pp. 7s. 6d.

Any book from the pen of Sir Maurice Amos is sure to be interesting, but this one is particularly opportune. At a time when the British Commonwealth is embarking upon yet another experiment in federal government, the experience of the United States, the federal constitution *par excellence*, is of special interest to English constitutional lawyers. This is the only book which presents the main features of that constitution within a reasonably small compass, and in a form which is of use to other than specialists. It consists of six lectures delivered in the University of Cambridge during the Lent term of 1938. The first of these begins with as much history as is necessary for an understanding of the rest of the course, and then proceeds to an examination of the position and functions of the President and of Congress. The remaining five lectures deal respectively with the Federal Judiciary, the Dual Government and the Commerce Clause, the Contract Clause, the XIVth Amendment, and the New Deal. The text of the Constitution is printed in an appendix.

The Colonial Empire and its Civil Service. By Charles Jeffries. With a foreword by the Rt. Hon. Lord Harlech. Cambridge University Press. xxv and 259 pp. 10s. 6d.

Progress made in recent years in the policy of the "unification" of the Colonial Service has rendered the existing works on the subject out of date. This excellent book supplies the need for a conspectus of the Service as it exists at the present day. Though not in any sense an official pronouncement, it may be regarded as authoritative, for the author has had access to and assistance from the Colonial Office. An introduction catalogues the Colonies and Protectorates and Mandates, giving a brief description of the essential features of each. The remainder of the book is in two portions, the first dealing with the history of the Colonial Service, and the second with the Service to-day. The work is addressed primarily to the inquiring layman, but it also merits the attention of the specialist.

Articles

Conventions of the Constitution. By Bool Chand. Journal of Comparative Legislation, vol. xx, p. 222.

The Canadian Experience and the Treaty-Making Power in the Government of India Act, 1935. By S. K. Das. Journal of Comparative Legislation, vol. xx, p. 204.

Jury Trial To-day. By R. M. Jackson. Cambridge Law Journal, vol. vi, p. 367.

Administrative Law and Administrative Jurisdiction. By W. Ivor Jennings. Journal of Comparative Legislation, vol. xx, p. 99.

Notes on Imperial Constitutional Law. By Berriedale Keith. Journal of Comparative Legislation, vol. xx, pp. 105, 251.

Indian States in the Federation. By Sir Benjamin Lindsay. Journal of Comparative Legislation, vol. xx, p. 91.

Constitutional Government and the Rule of Law. By Godfrey Phillips. Journal of Comparative Legislation, vol. xx, p. 262.

The Law of Public Meeting. By E. C. S. Wade. Modern Law Review, vol. ii, p. 177.

ADMINISTRATIVE LAW

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Statutes

Defence and Rearmament

The dangerous tension in international relations is reflected in three important statutes: the Air-Raid Precautions Act, the Essential Commodities Reserves Act, and the Fire Brigades Act.

Air Raid Precautions.

The *Air-Raid Precautions Act*, 1937 (1 & 2 Geo. 6, c. 6), is intended to secure that "precautions shall be taken with a view to the protection of persons and property from injury or damage in the event of hostile attack from the air". It places a duty on local authorities to submit to the Home Secretary air raid precautions schemes for this purpose. County councils and county borough councils are the responsible authorities except as regards fire fighting arrangements, which are left in the hands of boroughs (including county boroughs) and urban districts, with permission for rural districts to come in on a like basis if they desire. County councils are required to consult with county district councils before preparing the main schemes, which are to deal with such matters as the Home Secretary may prescribe by regulations. Local authorities may arrange to act as agents for one another in carrying out A.R.P. functions. In regard to London, the Home Secretary may allocate duties between the London County Council, the metropolitan boroughs and the City Corporation, but fire fighting duties are conferred on the L.C.C. within the administrative county. All local authorities are required to co-operate with one another, and power is given to act jointly, with the approval of the Secretary of State, who may authorise the appointment of a joint committee.

The Home Secretary may approve schemes with or without modification; and when a scheme has been approved it must be carried out forthwith by the relative local authorities. Local authorities may incur expenditure for A.R.P. work regardless of whether it is incurred in pursuance of a scheme or not; and land may be compulsorily acquired with the Home Secretary's approval. Grants in aid of

approved expenditure are payable in accordance with an elaborate formula laid down in the schedule to the Act.

De-rating of A.R.P. works.

An ancillary statute to the above measure is the *Rating and Valuation (Air-Raid Works) Act*, 1938 (1 & 2 Geo. 6, c. 65), which affords relief from liability for rating of air raid precaution works. The statute provides that any room or other part of a hereditament which has been added at any time after it was first assessed or was included in the hereditament solely for the purpose of affording protection in the event of hostile attack from the air, and which is not occupied or used for any other purpose, shall not be taken into consideration in assessing the value of the premises for rating purposes. A similar immunity is conferred upon structural alterations or improvements carried out for the same purpose.

National storage of essential commodities.

The *Essential Commodities Reserves Act*, 1938 (1 & 2 Geo. 6, c. 51), empowers the Board of Trade to call for returns from traders concerned with an essential commodity, giving information as to the stocks needed by them from time to time, and the facilities available for storing and utilising the stocks of the commodity in question. Any Government Department or body of persons having statutory power to obtain such information for any purpose is to exercise the power in order to assist the Board of Trade when requested to do so. This will no doubt enable the Board of Trade to utilise the information possessed by the agricultural marketing boards, the Wheat Commission, the fishery boards and similar bodies. Information obtained under this Act with respect to any particular undertaking is not to be disclosed except with permission, under pain of a stiff criminal penalty. There are also severe penalties for failing to supply information and for knowingly or recklessly making a false return.

Section 2 enables the Board of Trade, by arrangement with the Treasury, to make grants or loans to traders for the purpose of inducing them to increase their stocks of essential commodities or to improve the storage facilities. The Board of Trade may itself acquire and store stocks of essential commodities. Such Government-owned stocks may be varied, but except for preventing deterioration or maintaining suitable quantities, they shall not be disposed of otherwise than in such manner as Parliament may authorise in a subsequent Act. This is obviously intended to protect traders from Government dealing or speculation in the commodities in question.

A fund is established by section 8 to be called the Essential Commodities Reserve Fund, which is placed under the control or management of the Board of Trade. This fund will be fed by Parliamentary moneys and sums received by the Board in carrying out the Act. The payment of officials in administering the statute can be made either out of the fund or out of Parliamentary moneys, according to the determination of the Treasury.

Fire brigade services.

Fire protection is a service which has in the past been curiously neglected by the Central Government. Hitherto, no Government Department has been responsible for supervising or inspecting the local fire services. There has been no grant in aid, and even our knowledge of fire brigades has been exceedingly scanty. There are no regular returns or statistics published on the subject, and we have been dependent on the occasional light thrown by Royal Commissions and departmental committees.

The menace of air attack in case of war, with the consequent likelihood of fires being started by incendiary bombs on a large scale, made it unthinkable to continue this state of affairs. The first official recognition of impending change was the setting up of a Departmental Committee on Fire Brigades Services in 1936. The Report of this Committee has now been followed by the *Fire Brigades Act*, 1938 (1 & 2 Geo. 6, c. 72). This is a most curious Act and quite unlike any other legislation dealing with services administered by local authorities.

Section 1 imposes a series of duties on local authorities in regard to the provisions of fire services. Hitherto there has been no obligation, except in the case of the London County Council, even to provide a fire brigade. Henceforth every county borough council and county district council has the duty to make provision for the extinction of fires and the protection of life and property in case of fire, by securing: the services of a fire brigade and of such fire engines, etc., "as may be necessary to meet efficiently all normal requirements"; the efficient training of members of the fire brigade; efficient arrangements for enabling the fire brigade to be summoned in case of fire; and efficient arrangements for obtaining information with regard to the character of buildings and other property in the area, available supplies of water, and so forth. These services are referred to by the Act as "local fire services". It will be noted that the

obligation is to secure a provision of these services, and not to provide and maintain, and the statute expressly states that the fire authority may enter into arrangements for these services either wholly or in part to be provided and maintained by other fire authorities.

The Home Secretary may prescribe the standard of efficiency with regard to any of these matters, and these standards may vary as between different kinds of locality. The powers of fire authorities are widened so as to enable the authority to do virtually anything which is necessary for the purpose of fulfilling their obligations. In particular their powers in regard to the provision of fire hydrants and water supplies are greatly extended. Throughout the Act the clear intention is shown that co-operation shall take place between neighbouring authorities. Section 1 (5) requires every fire authority, so far as practical, to enter into arrangements with other fire authorities to secure the provision of assistance by the latter for dealing with fires which could not be dealt with adequately by the local fire services.

The parish fire brigades—if they can be dignified by such a name—are to be abolished, and their property, rights and liabilities transferred to the district authority. In order to secure co-ordination of fire services, a body called the Fire Services Commission is to be set up, for the purpose of considering arrangements made by fire authorities to provide assistance for dealing with fires which cannot be adequately dealt with by the local fire services; reviewing the fire services provided by local authorities; and reporting to the Secretary of State on these matters. The Fire Services Commission is to consist of a chairman and not less than three, or more than five, other members, appointed by the Secretary of State. They shall be paid such remuneration and other allowances as the Home Secretary may decide, with the consent of the Treasury. Tenure is to be fixed by the Secretary of State. Why a commission of this kind should have been set up is not clear. One would have expected that the Home Office would have become the responsible central authority with its own departmental inspectors, on more or less the same lines as those relating to the police force. It may be that the Home Secretary proposes to appoint some chief officers of local fire brigades to the commission. Whatever the intention may be, it is not revealed by the statute. Section 9 provides

Fire Services Commission.

that if the commission reports that adequate arrangements have not been made for the provision of mutual assistance between local fire authorities, they may submit to the Secretary of State a scheme for ensuring the provision by those authorities of such assistance, and after giving interested parties an opportunity for making representations the Secretary of State may approve the scheme either with or without modifications, and it then becomes the duty of the fire authorities concerned to carry it into effect.

The Act also enables the Home Secretary to set up one or more Fire Services Boards, at any time after the expiration of two years after the passing of the Act, if he is satisfied that efficient fire services have not been provided or not been maintained by any borough or district. A board of this kind has jurisdiction in relation to a particular area, and after it has been appointed no arrangements can be made by the fire authorities of the boroughs or districts in the area without the approval of the board. Moreover, the board has a duty to prepare and submit to the Secretary of State a scheme for the area, for ensuring the provision and maintenance by the fire authorities (under the general supervision of the board) of an efficient fire service throughout the area. These area schemes come into operation when approved by the Home Secretary, either with or without modification. It will presumably enable regional fire brigade schemes to be established by the boards. Apparently we are to have a new type of regional *ad hoc* authority for fire services. The Fire Services Board is also empowered to complain to the Home Office when a fire authority is in default, and the Home Secretary may then transfer to the board any of the functions of the defaulting authority which he thinks fit. The board has power to borrow money and to issue precepts to the rating authorities for the purpose of performing its functions.

War Office property: powers of Under-Secretary of State.

A short Act which may be regarded presumably as a by-product of rearmament is the *War Department Property Act*, 1938 (1 & 2 Geo. 6, c. 49). This Act lays it down that any instrument connected with the acquisition or disposal of land or other property to which the Secretary of State for War is a party shall be deemed validly executed by him if it is executed on his behalf by the Under-Secretary of State, or any other person authorised by the Secretary for War. This Act is quite a short one, occupying only one page in the statute book, but it is nevertheless absurd that the

time of Parliament should be occupied even to a small extent in dealing with such a trivial matter as this. If we had an adequate code of administrative law such consequential matters could and should be dealt with by departmental regulations.

Social Services

It is pleasant to find that despite the alarums and excursions of rearmament there are still signs of interest and progress in the social services. For example, the *Poor Law (Amendment) Act*, 1938 (1 & 2 Geo. 6, c. 23), enables public assistance authorities—that is, county borough councils and county councils—to grant a personal allowance not exceeding 2s. a week to anyone aged sixty-five or over, in receipt of relief in workhouses or other poor law institutions.

National health insurance: medical benefit for juveniles.

An undesirable gap in public health administration is filled up by the *National Health Insurance (Juvenile Contributors and Young Persons) Act*, 1937 (1 & 2 Geo. 6, c. 3). This Act makes eligible for medical benefit young persons who have attained school leaving age, as soon as they enter employment, even though they are under the age of sixteen. Formerly they were not qualified until they attained sixteen years. Section 6 imposes a duty on every local education authority to arrange for their officers to furnish the panel doctor with particulars of the young person's school medical record and such other information relating to the medical history of the juvenile as the panel doctor may consider necessary.

Instruction courses for unemployed juveniles: power to provide meals.

Another social insurance statute which has a bearing on local government is the *Unemployment Insurance Act*, 1938 (1 & 2 Geo. 6, c. 32). This enables local education authorities, when providing courses of instruction for young persons under the Unemployment Insurance Act, 1935, s. 76, to provide meals in the same manner and subject to the same conditions as they may be provided by elementary education authorities for school children in elementary schools.

Street playgrounds.

The *Street Playgrounds Act*, 1938 (1 & 2 Geo. 6, c. 37), is a melancholy reflection on the lack of playgrounds and open spaces in many of our crowded urban areas. It enables the council of any county (other than London), county borough, metropolitan borough, borough or urban district to make an order prohibiting or restricting the use of any specified road by vehicles for the purpose of enabling that road to be used

as a playground for children. The order may restrict traffic either generally or on particular days or during particular hours. The order must be confirmed by the Minister of Transport, who may cause a public inquiry to be held. Section 8 contains some curiously stringent requirements in regard to an inquiry. Thus, the person appointed to hold it may by summons require any person to attend, at a time and place specified, to give evidence or produce documents. He may take evidence on oath. Section 8 (2) enacts that any person who refuses or wilfully neglects to attend in obedience to a summons of this kind to give evidence, or who alters or conceals or destroys or fails to produce any book or documents, shall be guilty of an offence, and liable to a fine not exceeding £50, or imprisonment for a term not exceeding three months. One would scarcely have thought that such severe criminal penalties would be necessary in connection with such a very mild measure of social amelioration.

Population statistics.

The first official recognition of the importance of the population question in this country is to be found in the *Population (Statistics) Act*, 1938 (1 & 2 Geo. 6, c. 12). This measure empowers the State to pursue more fully one of its most important modern functions, namely, the acquisition of knowledge concerning the state of the nation. In its original form the Bill was drawn in much wider terms, but as the result of a remarkable display of frivolous opposition on the occasion of the second reading, the present statute carefully restricts the scope of permissible inquiries. Seldom has the House of Commons dealt with so important a subject in so frivolous a mood.

Section 1 requires every person registering a birth, still-birth or death, to furnish such of the particulars specified in the schedule as are appropriate and within the knowledge of the person concerned. These include, in the case of a birth, the age of the mother; the date of the marriage; the number of children of the mother by her present husband and how many of them are living; the number of children of the mother by any former husband and how many of them are living. It will be seen that this excludes any information relating to illegitimate children. For the registration of a death, information is to be given in the case of a man as to whether he had been married, and if so was married at the date of his death; and in the case of a woman who had been married, the year in which she was married and the duration

of the marriage, and whether she had children by her husband or any former husband. In the case of a deceased person of either sex, the age of the surviving spouse, if any, is to be stated.

The end of the prerogative writs.

The *Administration of Justice (Miscellaneous Provisions) Act*, 1938 (1 & 2 Geo. 6, c. 63), is of considerable importance in the field of administrative law, for it abolishes the prerogative writs of mandamus, prohibition and certiorari, and informations in the nature of quo warranto. This part of the Act is, however, more appropriately dealt with in another Section of this volume, but the student of administrative law will remember the prominent part played by the prerogative writs in connection with judicial control over public administration.

Food and drugs protection. 1 & 2 Geo. 6, c. 56.

The *Food and Drugs Act*, 1938, consolidates the mass of statutory enactments relating to food, drugs, markets, slaughter-houses and knackers' yards. It may be regarded, therefore, as a further step in that admirable process of codification of our public law for which the Ministry of Health deserves so much credit. The new Act contains 108 sections and occupies ninety pages of the Statute Book, a fact which gives some slight indication of its comprehensive nature. There have been a certain number of amendments introduced in the process of consolidation, but there are none of sufficient importance to warrant their being dealt with in detail here. Among the statutes repealed by the new Act are two quaint measures entitled 32 Hen. 8, c. 40, "Conc̃ning Phisicians", and 1 Mary, Session 2, c. 9, "An Acte touching thincorporations of the Phisitions in London".

Polling hours at local elections.

The *Local Government (Hours of Poll) Act*, 1938 (1 & 2 Geo. 6, c. 59), enables the polling hours at county council and borough council elections to be extended until 9 p.m. at the request of the county or counties.

Housing

Housing also receives attention in two separate statutes, the *Housing (Financial Provisions) Act*, 1938 (1 & 2 Geo. 6, c. 16), and the *Housing (Rural Workers) Amendment Act*, 1938 (1 & 2 Geo. 6, c. 35).

Exchequer contributions to local authorities.

The first of these statutes lays down a new scheme of exchequer contributions in respect of housing accommodation provided by local authorities. The payment for which new

houses completed after the beginning of 1939 are to rank for grant is at the rate of an annual contribution of £5 10s. for a period of forty years. Where the dwelling consists of a flat provided in a block of flats built on a site the cost of which, as developed, exceeds £1,500 per acre, the grant is to be made at a rate which increases in accordance with a table contained in the schedule, in proportion to the developed cost. The grant begins at £11 per annum for each flat, and goes up to a maximum of £26.

The Minister of Health may increase the grant for houses to £6 10s. per annum where he is satisfied that houses in a non-county borough or urban district which are occupied by members of the working class are let at rents which are substantially less on the average than similar houses in the rest of the country, and secondly, that the residual expenses falling on the borough or district council, considered in relation to their financial resources, would impose an undue burden on that area.

The housing accommodation to which all these grants apply is that which is rendered necessary by displacements of persons in connection with the demolition of insanitary houses, clearance or improvement orders or similar steps in connection with slum clearance, or by displacements occurring in the carrying out of redevelopment of houses which are unfit for human habitation and could not be rendered fit at reasonable expense.

Agricultural housing.

Section 2 deals with grants in respect of agricultural housing accommodation provided by local authorities, and here the Minister may make a payment of £10 for each new house over a period of forty years, and may increase this up to a maximum of £12 per annum where an undue burden would otherwise be imposed on the county district by reason of the high cost of providing the accommodation, and the amount of rent which it would be practicable to charge in respect of the dwellings. Where the county district council is satisfied that housing accommodation required for members of the agricultural population in the locality can more conveniently be provided by some person other than the council, they may make arrangements for that person to provide the accommodation, and, subject to certain conditions being observed, the local authority may pay an annual amount to the owner of the house not less in amount than the contribution made by the Minister.

County councils are also brought into the scheme of financial assistance by section 7, which requires them to make a payment of £1 per annum for forty years to the county district council in respect of each house ranking for a grant of £6 10s. or £10. The local authorities' share of the burden is to consist of half the annual amount of the Minister's contribution, but the period during which this is to be paid is to extend over sixty years. An exception to this proportion is that where the Minister has undertaken to pay £6 10s. a year the local authorities' contribution is to be equivalent to £2 15s.

Reconditioning of houses for rural workers.

The *Housing* (*Rural Workers*) *Amendment Act*, 1938, extends, until September 30, 1942, the time during which assistance may be given under the Housing (Rural Workers) Act, 1926. The latter measure first introduced the scheme whereby local authorities are able to make payments to assist the reconditioning of rural dwellings by the owners thereof. Hitherto, repairs and reconditioning had always been a matter for the owner of the property concerned, but it was thought desirable to improve the accommodation available for agricultural workers by giving State assistance to the landlord. This now continues for a further period of time without any drastic change. Section 5 of the new Act lays it down, however, that for a period of twenty years from the date on which a dwelling becomes fit for occupation after completion of the work, all reasonable steps shall be taken to keep the dwelling maintained in all respects fit for habitation by persons of the working classes. Section 6 restricts the increase of rent which may be asked after the carrying out of works to a figure not exceeding 4 per cent. of the amount by which the estimated cost of the works exceeds the amount of the assistance provided by the State.

Registration of architects.

It will be remembered that the registration of architects was first introduced in 1931 and amended by a further statute in 1934. The *Architects Registration Act*, 1938 (1 & 2 Geo. 6, c. 54), establishes a tribunal which is to hear appeals against the refusal of the Registration Council to register the applicant under the principal Act. The tribunal will consist of a chairman appointed by the Lord Chancellor, a member appointed by the Minister of Health, a member appointed by the Department of Health for Scotland, a member appointed by the Governor of Northern Ireland and persons appointed by the President of the Law Society and

A new tribunal.

equivalent organisations in Scotland and Northern Ireland. This tribunal is a mixed affair. None of the members are to be members of the Registration Council, but there is nothing to prevent them from being architects. It can scarcely be said, therefore, that the tribunal is a genuine administrative tribunal, nor on the other hand is it a domestic tribunal, since the majority of its members are appointed by Government Departments.

Section 1 of the Act introduces a number of exemptions from the prohibition against assuming the title "architect", in the case of officers employed by local authorities, in charge of the architectural work of those authorities. Where such a person belongs to one of the engineering associations such as the Institute of Civil Engineers, or the Chartered Surveyors' Institute or the Institution of Municipal and County Engineers, he is not to be prevented from using the word "architect" to describe his office, if and so long as he has working under him on the staff of the local authority an architect registered under the Act.

Regulation of Industry and Agriculture

Great increase of legislation affecting economic life.

The legislation regulating the conduct of industry and agriculture is expanding enormously in volume and increasing in complexity. During 1938, for example, Parliament passed the *Sea Fish Industry Act* (1 & 2 Geo. 6, c. 30), which contains sixty-three sections and four schedules, and runs into nearly seventy pages; the *Herring Industry Act* (1 & 2 Geo. 6, c. 42), which is a shorter statute because it is of an amending nature; the *Bacon Industry Act* (1 & 2 Geo. 6, c. 71), which is longer even than the Sea Fish Industry Act; and the *Coal Act* (1 & 2 Geo. 6, c. 52), which extends to nearly 100 pages. In addition there was the *Milk (Extension and Amendment) Act* (1 & 2 Geo. 6, c. 61), which can be disposed of shortly by explaining that it is an Act to increase the subsidy payable out of Parliamentary moneys to the Milk Marketing Boards from £2,000,000 to £2,750,000, and to release the Milk Marketing Boards and the Government of Northern Ireland from the obligation to make payments to the Exchequer.

It must frankly be stated that the principal Acts regulating various branches of the fish industry, coal mining and the bacon industry are of such an intricate nature and so involved in their terms that it is almost impossible to give a coherent

Obscure purposes.

account of them in a short space. The real difficulty of expounding this type of legislation, which is now becoming of such increasing importance, is, however, due to the fact that the essential aims of Parliament are nowhere made clear in the relative statutes. An historian looking back on this legislation fifty years from now will find it difficult to discover the purpose underlying it. If one examines legislation dealing with social services such as housing, or unemployment insurance, or food and drugs, the main objects in view are reasonably clear. The same cannot be said of such a statute as the Sea Fish Industry Act, although we are told in the preamble that it is an Act to make provision for the better organisation of the white fish industry. All that could be said by our hypothetical historian would be that the State had intervened in the processes of economic production and distribution in a very detailed manner, and had established a number of organisations for that purpose; but beyond that it would be difficult to discover the policy of the Acts. It may well be worth while to consider whether we might not profitably adopt the method which is now used in the United States in connection with the legislation of Congress, whereby the opening section of a statute is devoted to a detailed statement of the policy of the Act. This statement of policy is part of the statute.

A new phase.

It is clear, however, that governmental regulation of industry and agriculture is passing beyond the stage represented by the marketing board, that is, a mere conferring of statutory powers on institutions of the guild type. The

The White Fish Commission.

Sea Fish Industry Act, for example, constitutes a commission to be called the White Fish Commission, which is charged with keeping generally under review matters relating to the white fish industry, and advising and assisting the Minister of Agriculture and Fisheries, and the corresponding Minister in Scotland. The Commission consists of five members appointed by the Ministers, and its functions are to be deemed to be exercised on behalf of the Crown. The members are to hold office for a fixed term of years and Members of Parliament are disqualified, as also are persons possessing certain financial interests. Below the Commission there is set up the White Fish Industry Joint Council, for the purpose of giving advice and assistance to the Commission in the discharge of its functions. This council is composed of an independent chairman appointed by the Ministers,

together with other persons appointed by the Ministers and representing various interests connected with the fishing industry, such as producers, wholesalers, fishmongers, fish friers, curers, etc.

The Commission are to institute a register of persons carrying on a designated business. They are also to make regulations to restrict the sale of white fish, unless it bears a designation mark which it is proposed to introduce, and which is of the type already prevalent under the grading and marking schemes made by virtue of the Agricultural Produce Acts, 1928—1931. The Commission is empowered to regulate the manner in which white fish are to be packed, processed, etc. They may prescribe the quality of white fish which may be used in various processes; they can regulate the holding and conduct of fish auctions; the charges that may be made by persons in respect of white fish, and many other similar matters. The Commission may submit to the Ministers a marketing scheme relating to white fish, and embodying the restrictions and regulations commonly attached to such schemes. The marketing scheme must be administered by a marketing board which the Act contemplates shall be set up. This would consist of persons elected by those engaged in the industry. Provision is made for separate marketing schemes for producers and distributors respectively, with elaborate licensing arrangements in each case. There are also to be established consumers' committees and committees of investigation. Enough has been said to show the elaborate machinery which has been created to deal with sea fishing.

White Fish Marketing Board.

The *Bacon Industry Act* also seeks to erect a superstructure on top of the existing Pigs Marketing Board and the Bacon Marketing Board. Section 1 establishes a Bacon Development Board, to consist of five persons appointed by the Minister, four persons nominated by the Pigs Marketing Board, and four nominated by the Bacon Board. The Development Board is to exercise its functions in consultation so far as possible with these marketing boards, and they in turn are to act in accordance with any directions given to them by the Development Board in writing, except so far as they are expressly authorised by the Act to act independently.

The bacon industry further regulated by Development Board.

Part II provides that a "Factory Rationalisation Scheme" may be prepared for the purpose of regulating the producers' facilities in Great Britain and increasing the

efficiency of the bacon industry: Section 6 is worthy of note. It says that the Factory Rationalisation Scheme may be prepared by the Development Board *or* the Bacon Marketing Board and submitted to the Minister: provided that if within four weeks of the passing of the Act the Bacon Marketing Board informs the Minister that it intends to prepare such a scheme, the Development Board shall not submit a similar scheme until a period of six months has expired, nor shall the Development Board submit a scheme to the Minister so long as the scheme prepared by the Bacon Marketing Board is in force or under consideration by the Minister. It is difficult to understand why concurrent and alternative powers of this kind should be conferred. Surely one of these bodies is the proper body to prepare such a scheme: they cannot both be equally well suited for the task.

Part III introduces a system of licensing of bacon factories to be administered by the Development Board, and there are elaborate provisions concerning the conditions which may be attached to licences. Part IV deals with the system of pig supply, and gives power to regulate in great detail the making of "long contracts". Part V authorises the Bacon Marketing Board to impose quotas for bacon, and Part VI enables imports to be regulated.

The coal industry.

We propose to spare the reader any detailed exposition of the *Herring Industry Act* above-mentioned, but it is necessary to describe the *Coal Act* in some detail. The origin of the Coal Act is to be found in the complete breakdown of the rationalisation provisions of the Coal Mines Act, 1930, owing to the inadequate powers of the Coal Mines Reorganisation Commission, and the hostility of the mining industry to the accomplishment of the purposes for which the Commission was set up.

The Coal Commission.

It will be remembered that the Coal (Register of Ownership) Act, 1937, established a register of coal holdings as a preparatory step to the rationalisation of royalties. The present Act is divided into four parts. Part I is by far the most important, since it provides for the constitution of the Coal Commission and establishes the machinery for the unification of coal-mining royalties through the acquisition by the Commission of the ownership of all coal in Great Britain. The Commission is to consist of a chairman and four other persons appointed by the Board of Trade, of whom at least

two must have had administrative or other practical experience in coal mining, and one of them must have been a wage earner in the mining industry. The appointment of the members is to be for a fixed term of not less than five or more than ten years. Members of Parliament are disqualified, and so, too, are persons directly connected with the industry, or indirectly connected, as an officer of an organisation of employers or of workpeople.

The duties of the Commission comprise the exercise of their functions as owners of the fee simple in coal and coal mines "in such a manner as they may think best for promoting the interests, efficiency, and better organisation of the coal mining industry"; but the Commission are expressly forbidden from themselves engaging in coal mining or carrying on any operations for that purpose other than searching and boring for coal. They are to grant leases for these purposes. The Board of Trade is empowered to give general directions to the Commission as to the exercise of their functions in regard to matters which appear to the Board to affect the national interest, including all matters concerning the safety of the industry. In addition, the Commission are to exercise the functions of the Coal Mines Reorganisation Commission as laid down by the Coal Mines Act of 1930, and amended by Parts II and III of the new Act.

Unification of royalties.

The unification of the ownership of coal is carried out by section 8, which confers a statutory vesting in the Commission of all interests in coal and coal mines on July 1, 1942. During the interim period between the valuation date (January 1, 1939) and the vesting date above-mentioned all persons who have interests in coal are to hold these interests as though they had entered into a contract on the valuation date for the sale of them to the Commission, with provision for completion of the transaction on the vesting date. The aggregate amount of compensation to be payable is laid down at £66,450,000. This sum is to be allocated between the various valuation regions by a central valuation board, which is set up by the third schedule to the Act. The regional valuation boards are to make individual valuations in these regions. All these provisions are subject to certain retained interests and rights which are withheld from the Commission.

Valuation machinery.

Conditions as to leases and rents.

In granting leases the Commission are to obtain the best rent which in their opinion is reasonably to be obtained, subject to the power of the Commission under section 25 to

Royal Naval Reserve and Royal Fleet Reserve, and officers and men of the Naval Volunteer Reserves, by a Proclamation dated September 28, 1938 (S. R. & O. 1178/38). The Proclamation is delightfully non-committal. Its preamble notifies that "owing to the state of Public Affairs and the demands upon Our Naval Forces for the protection of the Empire, an occasion has arisen for ordering and directing" in accordance with the respective statutes.

The Proclamation mentioned above was withdrawn by a subsequent Proclamation dated November 25, 1938. This is embodied in S. R. & O. 1408 of 1938.

and the Auxiliary Air Force;

An Order in Council declaring the existence of an emergency for the purpose of calling out officers and men of the Auxiliary Air Forces was contained in S. R. & O. No. 1170 of 1938 dated September 26. Here there was no statement of the underlying causes or purpose beyond the declaration that a case of emergency exists. In S. R. & O. No. 1402, 1938, "His Majesty, by and with the advice of His Privy Council, doth hereby declare that a case of emergency no longer exists" so far as the Auxiliary Air Force is concerned.

billeting the Army;

The Army gets down to brass tacks in a more realistic manner in S. R. & O. No. 1175 of 1938, which deals with billeting in cases of emergency. It lays down the prices to be paid to and the accommodation to be provided by keepers of victualling houses and occupiers of other buildings for billets requisitioned in accordance with section 108 (*a*) of the Army Act in case of emergency. The prices to be paid can scarcely be regarded as lavish: 7d. is allowed for breakfast, 10d. for dinner, 4d. for supper, with 10d. per night for lodging and attendance, making 2s. 7d. per day for full board and lodging. The allowance for stable room and fodder and straw for a horse is 2s. 3d. a day.

essential commodities defined;

The *Essential Commodities Reserves* (*Declaration*) *Order*, 1938 (S. R. & O. No. 1110, 1938), is made by the Board of Trade under powers conferred by section 6 of the Essential Commodities Reserves Act, 1938, to which reference has already been made above. This Order specifies the commodities which, in the opinion of the Board of Trade, would be essential to the vital needs of the community in the event of war. The list extends to four and a half pages of small type and comprises an extraordinary collection of commodities ranging from basic slag to treacle.

A. R. P. schemes.

The subject of Air-Raid Precautions receives attention in a number of Statutory Rules and Orders, three of which will be mentioned shortly. The *Air-Raid Precautions* (*General Schemes*) *Regulations*, 1938 (S. R. & O. No. 251, 1938) lays down the matters which are to be dealt with in Air-Raid Precautions (General Schemes) which local authorities are to submit to the Home Secretary. These cover seventeen separate items. The Air-Raid Precautions Act has already been explained on p. 37. The *Air-Raid Precautions* (*Fire Schemes*) *Regulations*, 1938, made by the Secretary of State with the concurrence of the Treasury under section 11 (1) (*c*) of the Air-Raid Precautions Act, 1937 (S. R. & O. No. 252, 1938) lays down the matters which must be dealt with by local authorities submitting air-raid fire precautions schemes in England and Wales. This is much shorter and only includes six items. The *Air-Raid Precautions* (*London*) (*Allocation of Duties*) *Order*, 1938 (S. R. & O. No. 253, 1938) deals with the distribution of powers in connection with air-raid precautions schemes as between the L.C.C., the City Corporation and the Metropolitan Borough Councils. The air-raid precautions arrangements within the Metropolis have given rise to great apprehension and even the local authorities themselves are dissatisfied; so one cannot regard the present Order as being the last word on the subject.

Constitution and duties of the Air Council.

One notable Order relating to re-armament and war preparations is the Order in Council No. 760 of 1938, which provides for the membership, duties and business, etc., of the Air Council. The Air Council shall consist henceforth of the Secretary of State, who presides, the Parliamentary Under-Secretary of State for Air, Chief of the Air Staff, the three Air Members for Personnel, Development and Production, and Supply and Organisation, and the Permanent Under-Secretary of State for Air. The Chief of the Air Staff is to be appointed by His Majesty, and the other members of the Council by the Secretary of State (who may also include other additional members not exceeding two). The Secretary of State is expressly made responsible to the King in Parliament for all the business of the Air Council. The Chief of the Air Staff is to be first and senior Air Member of the Council and the principal adviser to the Secretary of State in the direction of the Air Force.

All business, other than that which is specially reserved to himself by the Secretary of State, is to be transacted in

three principal divisions: First, that coming under the Parliamentary Under-Secretary of State for Air for so much of the business of the Air Council as may be assigned to him from time to time by the Air Minister. Second, that coming under the Chief of the Air Staff and the three other Air Members respectively, who are to be responsible to the Secretary of State for the administration of so much of the business of the Air Council relating to the command, disposition, organisation, personnel, training, equipment, armament and maintenance of the Air Force as he may assign to them, or each of them, from time to time. Third, that coming under the Permanent Under-Secretary of State for Air, who is to be responsible for such duties discharged by the Air Council as are not assigned to other members. That is to say, he is made a kind of residuary legatee. He is also made responsible for financial advice and (as accounting officer) for the control of expenditure, for the general conduct of correspondence, for the direction of the organisation and co-ordination of the business of the Ministry. He is Secretary of the Air Council.

Superannuation of local government officers.

The universal superannuation system introduced by the *Local Government Superannuation Act*, 1937, is put into operation by S. R. & O. No. 574 of 1938 as regards the ascertainment of the status of persons employed by local authorities before, on, or after the appointed day. Provisions are laid down as to the manner in which questions concerning the status of officers are to be decided and the procedure by which appeals to the Minister are to be conducted where an employee is dissatisfied with the decision of the local authority, or where the local authority has failed to make a decision. A number of appeals have already been made to the Minister under these regulations.

Delegation of market functions to Livestock Commission.

The *Markets and Fairs Order*, No. 1597 of 1938, delegates all the functions of the Minister of Agriculture and Fisheries exercisable in relation to markets to the Livestock Commission set up under the Livestock Industry Act, 1937.

Exchequer grants to local authorities.

The *Local Government (Adjustment of Grants) Regulations*, 1938 (S. R. & O., No. 1143, 1938), lays down the manner in which the various Exchequer Grants payable under the Local Government Act, 1929, and the Local Government (Financial Provisions) Act, 1937, are to be adjusted where alterations of boundaries have occurred. It need hardly be

said that the provisions of this Order are exceedingly complicated and will therefore not be explained in detail here.

Coal Mines Committees of Investigation.

Coal Mines (Committees of Investigation) Rules, 1938 (S. R. & O., No. 800, 1938), lay down the procedure to be followed by Committees of Investigation appointed under the Coal Mines Act, 1930, as amended by the *Coal Act* of 1938. The main purpose of these Committees of Investigation is to inquire into complaints made as to the working of the district schemes for coal production, price fixing and cognate matters under the compulsory system of cartelisation introduced in 1930. There is a National Committee of Investigation for national matters and District Committees for district schemes. The rules deal with such matters as frequency of meetings, notice of meetings, quorum, voting, the keeping of minutes, the investigation of complaints, the expenses of the committee, the making of returns to the Board of Trade and declarations of secrecy.

Central Appeal Tribunal.

The *Coal Mines (Central Appeal Tribunal) Rules*, 1938 (S. R. & O., No. 1464, 1938), lay down the procedure for the Central Appeal Tribunal established by section 5 of the *Coal Act*, 1938. The Appeal Tribunal is to hear objections to the decision of a Committee of Investigation where a person is aggrieved by that decision. A party to an arbitration before the Tribunal may appeal and be heard in person, by counsel or solicitor, or by such other representative as the Tribunal may in its discretion allow.

Postal telegrams.

Persons interested in the development of the English language through the use or misuse of it by officials will be interested in the *Telegraph (Inland Written Telegram) Regulations*, 1938 (S. R. & O., No. 694 of 1938). This regulates at length the sending of telegrams within the United Kingdom. Clause 22 deals with the mode of counting words and lays it down that subject to the Regulations the contents of telegrams shall be reckoned and charged for according to various rules. Among these is a rule that where a combination of words is, by the usage of the English language, recognised as one word, whether written together, with or without a mark of abbreviation, or joined by a hyphen, such combination, when so written, shall be counted as one word. Thus can't, don't, shan't, couldn't, halfpenny, fifty-five, mother-in-law, etc., would each be counted as one word, while can'tcome, goodbusiness will each be counted as two words.

It is also interesting to note that no telegrams shall be transmitted or tendered for transmission if they contain anything which is grossly offensive or of an indecent, obscene or menacing character. These very wide prohibitions are left in the vague terms just mentioned and no attempt whatever is made to explain what kind of menace, for example, is prohibited; or even what constitutes a menace. Fortunately the Regulations only refer to inland telegrams as otherwise this particular clause would no doubt strike a severe blow at the continuation of diplomatic communications received by telegram.

It is certainly undesirable that an undefined discretion of this sort should be left in the hands of minor officials conducting a communication service which may be regarded as one of the media of free speech. There must, of course, be some limit to what can be sent over the telegraph wires, but surely it would be better to particularise in greater detail, or at any rate to insert some safeguard against abuse.

CASE LAW

Local Government Areas

Financial adjustments following boundary extensions.

The most important case of the year in the field of local government was *Oxfordshire County Council* v. *Oxford City Council*, [1938] 2 K. B. 415. The matter in issue concerned the compensation payable between local authorities following an adjustment of boundaries. On April 1, 1929, the Oxford Extension Act, 1928, transferred part of the Headington Urban District, parts of the Headington Rural District and of the Woodstock Rural District, from the Administrative County of Oxford to the County Borough of Oxford. The result of this transfer was that the rateable properties in the transferred areas would henceforth pay their rates to the city of Oxford and not to the county district councils. Previously they had, of course, paid rates which included both the rates required by the district council in respect of local services such as the upkeep of minor roads, sanitation, etc., and county rates recoverable by the county council in respect of the county services such as main roads, county police and education. The Oxford Extension Act provided for the adjustment of financial relations between the city and the county, and applied section 62 of the Local Government Act,

1888. The severed parts had been profitable to the local authorities of which they previously formed part (*i.e.*, Oxfordshire County Council, Headington Rural District Council and Woodstock Rural District Council) in the sense that the rates which they yielded exceeded the costs of the services which were provided in the areas concerned. The result was that the burden on the ratepayers in the reduced areas of the three local authorities was increased. The Local Government Act, 1888, by itself does not give a right either to the county council or to any other local authority which loses a profitable rating area to recover compensation from the local authority which gains it by the extension of boundaries. This was decided by the House of Lords in *Caterham Urban District Council* v. *Godstone Rural District Council,* [1904] A. C. p. 171; but the position was modified by the Local Government (Adjustments) Act, 1918, which enacts that provision shall be made for the payment to any authority of such sum as seems equitable in respect of any increase of burden thrown on the ratepayers of the area and the authority in meeting the cost incurred by that authority in the execution of their powers and duties consequent upon the alteration of boundaries or other change in relation to which the adjustment takes place.

A year after the coming into operation of the Oxford Extension Act, 1928, the Local Government Act of 1929 came into force, by which the county council became the highway authority for all roads within the county; and, secondly, it became responsible for public assistance services which had formerly been carried out by the boards of guardians.

The district councils whose ratepayers lost for that one year the financial advantages they would have had if the transfer of territories had not taken place were paid and had accepted a sum of money in satisfaction of their claims, but the question then arose as to whether the Oxfordshire County Council could claim for the loss suffered by them in administering public assistance and highway services without the profitable territories which were now included in the city of Oxford. The periods of time in respect of which compensation is payable was laid down by the Act of 1918, as being fifteen years for the poor rate and twenty-one years in respect of roads; so the unexpired periods for which the county claimed were fourteen and twenty years respectively. The arbitrator

referred the matter to the Court by way of a special case stated as to whether he should or should not allow either or both of these claims. The Court of Appeal by a majority allowed the claim of the Oxfordshire County Council, but Bennett, J., in a powerful dissenting judgment, expressed the opinion that the claim should not be allowed, since the increased burden falling on the county was not due to the extension of the city boundaries but to the quite different fact that after the change of boundaries had taken place Parliament, for the first time, had laid upon the county council a new duty and upon the county ratepayers a new burden in respect of that duty. Such a burden, he said, is not an increase to an existing burden as a consequence of change of boundaries. So to hold would, it seemed to him, enable adjustments to be made at any time if Parliament established a new public service (for example, hospitals for the sick) and laid the duty of performing it upon county councils and county boroughs and the burden of paying the cost of it upon the ratepayers of those authorities. The logic of this dissenting judgment appears irresistible and Mr. Justice Bennett's approach is more coherent in principle and more practical in result than the doctrine laid down by Lord Justices Greer and MacKinnon. The matter will no doubt go to the House of Lords, and it will be surprising if the majority decision stands.

Liability of Statutory Authorities

Negligence of sanitary authority in repairing highway. Non-feasance inapplicable.

A point of some importance in connection with the responsibility of local authorities towards the public arose in *Newsome* v. *Darton Urban District Council*, 54 T. L. R. 945. The defendant council was both highway authority and sanitary authority. In its latter capacity it had dug a trench in the road for the purpose of connecting the drains of some new houses with the sewers. After the work was finished the trench was filled in, but owing to bad workmanship it subsided in various places, but these were made good. In August 1936 a further subsidence appeared, forming a hole which was dangerous to persons using the highway. The plaintiff was riding his bicycle along the highway and was injured as a result of his bicycle overturning when it reached the hole. The defendant council would not have been liable for non-feasance as a highway authority, but the Court of

Appeal decided that their negligent action was performed in their capacity as sanitary authority, and that therefore they were not protected by the doctrine of non-feasance, which is applicable only to a highway authority. They were accordingly liable for damages to the plaintiff.

Failure of light on a safety island. Misfeasance.

In *Polkinghorn* v. *Lambeth Borough Council*, 54 T. L. R. 345, the question of misfeasance arose. The local authority had provided a "safety island" in the public highway for persons wishing to cross the street, and they placed on it a post or bollard which was illuminated at night by an automatic device which should have extinguished it in the morning. A few days before the accident the light on the bollard had been broken and a temporary light had been fitted in its place. It should have remained illuminated until 5.35 a.m. but for some unknown reason it went out at an earlier hour, with the result that the plaintiff, who was driving a car at a moderate speed, was unable to see the bollard and collided with it, causing injury to himself. In an action for damages the defendant council denied negligence and alleged contributory negligence. The Court of Appeal held that the bollard represented an obstruction of the highway, and to leave it unlighted in the dark was negligence at common law. They accordingly upheld the decision of the County Court Judge who had awarded the plaintiff damages. These cases would appear to indicate a distinct tendency on the part of the Courts to extend rather than to narrow the responsibilities of local authorities for negligent action in connection with the highways.

Railway company liable for non-feasance as highway authority.

A further limitation of the doctrine of non-feasance was laid down in *Swain* v. *Southern Ry.*, 54 T. L. R. 1119. Here the plaintiff was cycling to work on a road which was carried by a bridge over the Southern Railway line, and when it descended the approach on the other side the wheel of the bicycle got into a rut of exceptional width and depth with the result that the plaintiff was thrown from his machine and suffered serious injuries. The railway company argued that although the road was repairable by them, there had been transferred to them only the duties previously resting on the surveyor of highways, with the result that the railway company were not liable for negligence arising from non-feasance in this matter, since the surveyor was not so liable. Mr. Justice Humphreys held that the railway company had a statutory liability to maintain the bridge and its approaches

so as to keep them safe for ordinary traffic; that they had failed to do so; that the railway company was liable not only for misfeasance but also for non-feasance; and, last but not least, that the railway company was not a public body performing a public duty so as to be able to plead the protection of the Public Authorities Protection Act, 1893.

Stopcock boxes placed on highway. Negligence of water board.

Another case of negligence committed in connection with the highway was *Wells* v. *Metropolitan Water Board*, 54 T. L. R. 104. In this case the Metropolitan Water Board had provided a stopcock enclosed in a box which was placed on the highway. This box was fitted with a hinged iron lid which, when it was open, remained upright and projected above the level of the road. The lid of the box in question became open with the result that the plaintiff tripped and fell over it and suffered personal injuries. She brought an action for negligence against the water board. It was admitted to be common for children to open these boxes and it appeared in evidence that the lid of the valve box in question had been lifted open by a child. Mr. Justice Humphreys held that since one might expect children to tamper with boxes of this kind, it constituted negligence for the Metropolitan Water Board to supply boxes which could be opened and left open in a manner dangerous to the public. He accordingly held that the plaintiff was entitled to recover.

Water liable to plumbo-solvency: failure to warn. Negligence.

Another instance of a water undertaking being held responsible for negligence was *Barnes* v. *Irwell Valley Water Board*, 54 T. L. R. 815. The negligence complained of was committed in connection with the supply of water by the defendant water board. The board fulfilled its statutory duty of supplying a pure and wholesome supply of water in their mains, but after leaving the mains the water had to run through 24 feet of old lead piping on the consumers' premises before it arrived at the tap. The water was of an exceedingly soft character, and was plumbo-solvent, that is, it was liable to absorb lead from lead service pipes. Water in this condition could easily infect persons using it with lead poisoning, and this actually occurred to the plaintiffs, who were a ratepayer and his wife. It was possible to take precautions to secure immunity against this disease and it was also possible for the water undertaking to harden the water so as to eliminate plumbo-solvency, but the Irwell Water Board had not taken either of these steps and had moreover not issued a warning to the plaintiffs. The Court

of Appeal accordingly held that the finding of negligence in the Court below had been rightly arrived at, and refused to disturb the finding.

Compensation for land.

The question of compensation for land acquired by public authorities is becoming increasingly important every year. It is not always easy to decide whether cases dealing with this subject come under Administrative Law or the Law of Property. There are three cases of this kind reported in the present volume under the latter heading. They are as follows: *The Master and Fellows of University College, Oxford* v. *The Secretary of State for Air, Stocker* v. *Ministry of Health,* and *All Souls' College* v. *Middlesex County Council* (see pp. 108–9).

Discretion and its Control

Traffic Licensing Commission entitled to hold public inquiry.

The subject of discretion is one of perpetual importance and interest to the student of Administrative Law. In the year under review there were three cases deserving of note in this connection. The first is *Woodward* v. *Licensing Authority for the North Western Traffic Area,* [1938] Ch. 331. The facts were somewhat complicated. A certain haulage contractor was the holder of an "A" licence under the Road and Rail Traffic Act, 1933, whereby he was entitled to use a vehicle for the period ending April 30, 1938. The contractor died in March, 1937, and his widow applied for the "A" licence, and this was granted to her in respect of the same vehicle for the unexpired portion of the term. The Commercial Motor Users' Association informed the licensing authority that the widow was negotiating for the sale of the business, and that when her application had been granted they would in turn make an application under section 11 (3) (*b*) of the Act of 1933. The Traffic Commissioner informed the applicants that in his opinion the application was one to which the particular section of the Act could be taken to apply, and that in order to exercise his function properly he considered it necessary to publish the application and to hold a public inquiry. The application would be published in Part I of *Applications and Decisions.* The only power to hold the inquiry was given by section 11 (5), which provides that the "licensing authority may hold such inquiries as he thinks necessary for the proper exercise of his functions under this Act". The applicants contended that the Area Traffic Commission had no power to publish the application or to hold an inquiry, but Mr. Justice

Farwell decided that this was an erroneous view of the matter, and that if the licensing authority thinks it right to hold an inquiry in any case, then not only is there nothing which prohibits him from doing so, but that section 11 gives the express power. The importance of the case from a practical point of view is that the act of publication and the holding of a public inquiry may lead to objections being lodged against the applicant which would not otherwise appear.

Powers of Minister of Health to confirm a compulsory purchase order made by housing authority.

Yet another attempt to restrict the powers of housing authorities was made in *Brighton Corporation Order, 1937 (Appeal of E. Robins & Son, Ltd.)*, 54 T. L. R. 687. The Corporation of Brighton declared a certain area within the borough to be a clearance area under the Housing Act, 1930. They further made an order under section 20 of the Housing Act, 1936, for the compulsory purchase of the various properties within the clearance area so declared, and of lands which the council had determined to purchase as being lands adjoining the clearance area and being required for the satisfactory development or use of the cleared area. This compulsory purchase order was submitted to the Ministry of Health and notice of the making of the order was served on the appellant company, which lodged their objection with the Minister. The Minister subsequently confirmed the compulsory purchase order. Messrs. Robins owned a brewery, and the land in which they were interested had upon it some dwellings which they wished to replace by an extension of their brewery. The company appealed against the confirmation on the following grounds: (1) That, by section 25 (3) of the Housing Act, 1936, Brighton Corporation were given a discretion whether they should deal with the land comprised in the compulsory purchase order by means of a clearance order or by means of a compulsory purchase order, and that it is an implied requirement of the Act that the discretion should be exercised judicially and according to law, and with due and proper regard for all the circumstances of the case, and not arbitrarily; (2) That, in deciding to deal with the land in question by means of a compulsory purchase and not a clearance order, the corporation failed to exercise their discretion judicially or to have regard to the circumstances of the case, and acted arbitrarily and contrary to the requirements of the Act; (3) That it is an implied requirement of the Housing Acts that the discretion which those Acts conferred on the Minister to decide whether or not he would

confirm a compulsory purchase order made under the Act of 1936 must also be exercised judicially and on the material provided by all the circumstances of the case placed before him for consideration by himself or by the inspector whom he appointed for the purpose; (4) That, in the present case, the Minister, in confirming the order in question, did not exercise his discretion judicially and with regard to all the circumstances; and (5) That, on all the facts and in all the circumstances of which the corporation knew or ought to have known, the making of a compulsory purchase order caused unnecessary and unjustifiable hardship to the applicant company, and was not necessary, fair, or desirable in the public interest, the case being one which should have been dealt with by means of a clearance order.

Mr. Justice du Parcq, in dismissing the appeal, said that nothing had been done which indicated that the requirements of the Act had not been complied with, or that the interests of the applicants had been substantially prejudiced. A local inquiry had been held, and no criticism was addressed to the proceedings at the inquiry. There was no obligation on the Minister to re-open a discussion with the applicants before deciding to confirm the order.

Liquor licensing: bias alleged.

R. v. *Sheffield Confirming Authority*, 36 L. G. R. 38. This was a licensing case where the confirming authority had refused to confirm an order for the provisional removal of a publican's licence to premises which were adjacent to a housing estate owned by a local authority. Some of the justices composing the confirming authority were also members of the Sheffield City Council. It was alleged that their decision as justices had been improperly influenced through bias arising from the fact that the local authority had expressed an opinion unfavourable to the grant of a licence when considering the problem of town planning. It was further argued that the Sheffield Corporation itself intended to apply for licences for premises on their housing estate and were therefore opposed to the grant of licences for rival premises close to the estate. Thirdly, it was said that one of the justices had stated that he disapproved the granting of any licences in or near the estate. The Divisional Court of the King's Bench decided unanimously that there was no substance in any of these contentions so as to invalidate the refusal of the confirming authority to grant the licence. The Lord Chief Justice remarked that he could imagine a member of the Bar or

bencher of an Inn, "not of marked or fanatical temperance proclivities", objecting to licensed premises in the precincts of the Temple yet contemplating with equanimity a very attractive set of licensed premises at the corner of Fleet Street and Middle Temple Lane. He said: "If this gentleman is so concerned about the sacrosanctity of the council land itself, I can imagine that he might think it might be easier to preserve that sacrosanctity if the legitimate need of thirsty mankind were provided for not far off on land not corporation land." The Court decided that there was no reason to fear that the principles of justice had been contravened in this instance.

Minister's jurisdiction in superannuation dispute conclusive and final.

A case in which the Lord Chief Justice gave vent to an utterance which is somewhat surprising in view of some of his former statements was *R.* v. *Minister of Health, Ex p. Committee of Visitors of Glamorgan County Mental Hospital*, 36 L. G. R. 164. A dispute had arisen between the hospital authority and Thomas Williams, a shoemaker employed at the asylum, as to whether he was entitled to a superannuation allowance. He had retired at the age of fifty-five, and the committee contended that he was not entitled to a superannuation allowance because he had not served for twenty years. The Minister held that the provisions of the Asylum Officers' Superannuation Act, 1909, requiring twenty years' service did not apply to officers required to retire at fifty-five under section 11 of the Act. Section 15 of the Act states: "In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum . . . such dispute shall be determined by [the Minister], whose decision shall be final". On appeal the Divisional Court of the King's Bench held the Minister's decision is conclusive and that no appeal lies from it even if questions of law are involved. Here, said the Lord Chief Justice, was a dispute, it was a dispute as to the right to superannuation allowance, and that was the dispute which the Minister took into consideration. He expressed no opinion as to the merits of this particular case, and concluded: "I will only say this for myself, having from time to time had to make observations on this kind of enactment, that, if ever there was a case where it appeared highly satisfactory that the Legislature in its wisdom has provided for finality of decision, this appears to me to be a case of that kind."

Another case where a rule for certiorari was refused was *The King* v. *Barnstaple Justices, Ex p. Carder*, [1988] 1

Cinema licensing: extra-judicial meetings of justices not controllable by Court.

K. B. 385. The Cinematograph Act, 1909, makes no provision for the grant of a provisional licence in respect of premises not yet erected, and in this respect does not follow the example of the Licensing Acts relating to intoxicating liquor. As a result, in order to overcome the practical difficulties involved, the justices of the borough of Barnstaple have evolved a practice of treating an application for the approval of plans for a cinema as though it were an application for a licence, which is automatically granted at a subsequent date if the plans are approved. This enables a builder or promoter to know before the work is actually put in hand whether a licence will be granted when the building is completed, and so avoids the difficulty that building owners will not take the risk of erecting expensive buildings for which a licence might later be refused. In this particular case the borough justices were required to show cause why a writ of certiorari should not be issued to them to bring up and quash the refusal of an application by Carder for the approval of plans converting certain premises into a cinematograph theatre, which plans were approved and passed by the Barnstaple Corporation in 1936; and, secondly, why a writ of mandamus should not issue commanding them to hear and determine the said application according to law. The Divisional Court of the King's Bench decided that whether or not the practice which has grown up is illegal, the justices, in approving the plans or in refusing to do so, were engaged in extra-judicial proceedings which could not be controlled either by certiorari or mandamus. These writs, said the Lord Chief Justice, do not go to justices who happen to be meeting as a matter of convenience and expressing views. They go to them when they are sitting in a judicial capacity under the terms of some statute. Mr. Justice du Parcq said that he considered the arrangement highly inconvenient. It is quite certain, he continued, that there is no power in the county council, and therefore no power which could be conferred upon justices, to give binding intimations as to future events and to lay it down that a licence will automatically be granted or refused at a later date. This would obviously fetter the hands of other persons. He said: "It seems to me to be unarguable that any body of persons exercising, I do not say judicial functions, but such functions as it is the duty of justices in these cases to exercise, can (to use a phrase which has been used during the hearing of this case) by what is

called a 'gentleman's agreement' fetter, limit, control or in any way affect their own future decisions or those of other justices in the future. As a matter of fact, no application for a licence is before them."

Private street works. Power to include non-frontagers.

Another case on discretion concerned private street works. This was *Hornchurch Urban District Council* v. *Webber and others*, [1938] 1 K. B. 698. Once again the discretionary powers of the local authority were upheld by the Divisional Court of the King's Bench. The particular matter in question related to the right of the urban authority to include, for purposes of apportioning the expenses of private street works, premises which do not adjoin, front or abut on the street. A resolution is required to include such premises, and here it was sought to compel the local authority to make such a resolution where they had not done so. The Lord Chief Justice made the following statement in the course of his judgment: "There is clear and express authority on the point that, if they refrain from passing a resolution of that kind, no Court can tell them that they must do so or behave as if they had done so. I have no hesitation in expressing the view myself that, although it is highly desirable that administrative acts should not be permitted to encroach on the field of judicial decision, it is impossible, on these words in this section, to say that judicial decision can operate to compel an administrative act to be done which has not been done or to treat the matter as if it had been done."

Local Government Audit

Effect of repeal of public statute on private Act.

Two cases occurred during 1938 relating to the district audit. One was *R.* v. *West Monmouthshire Omnibus Board, Ex p. Price*, 86 L. G. R. 156. The facts were as follows. The omnibus board, consisting of local authorities, was constituted by a private Act in 1926. The Act applied the provisions of the Local Government Act, 1894, to the accounts of the board and the audit thereof. The Act of 1894 was subsequently repealed by the Local Government Act, 1933. The question arose as to whether the provisions of the earlier Act could still be considered as applied to the omnibus board by the private Act of 1926. Under the Act of 1894 local government electors had the same right to inspect the district auditor's report as if the board were a local authority, which it in fact is not. Under the Local Government Act, 1933,

the accounts of the district auditor are open to the inspection of the local government electors.

The Court held that the Act of 1933 now applied to the accounts of the omnibus board in place of the provisions of the Act of 1894 so that any local government elector was entitled to inspect the district auditor's report.

Surcharge: costs resulting from illegal resolution a loss from misconduct.

The other case on audit was *Davies* v. *Cowperthwaite*, 36 L. G. R. 459. The Rhondda Urban District Council resolved in September 1936 to pay £30 out of the rates to support a march of the unemployed. The clerk of the council advised the local authority that the payment was illegal but they nevertheless proceeded to pass the resolution. The appellant applied to the High Court for an interim injunction and when the motion for the injunction came on for hearing the Rhondda Council reversed their resolution and submitted to judgment. They were then ordered to pay the taxed costs, which together with their own costs amounted to £85 2s. The district auditor refused to surcharge this amount on the councillors who had voted for the resolution on the ground that it was not a loss or deficiency resulting from negligence or misconduct. On appeal the Divisional Court of the King's Bench held that the auditor had a duty to surcharge the costs on the councillors who had voted for the resolution. Branson, J., considered that after they had been warned by the clerk that the resolution was illegal, to persist in passing it was sufficient to make the loss a result of misconduct. Mr. Justice du Parcq observed that the councillors acted in a way in which responsible men, acting reasonably and desirous of doing their duty to the ratepayers according to law, would not have acted, and they were therefore negligent and guilty of misconduct.

Disclosure of Documents

Councillor's right of access to documents, and counsel's opinion.

A case which may be grouped with the *West Monmouthshire Omnibus Board Case* is *R.* v. *Barnes Borough Council*, 36 L. G. R. 524. This dealt with the right of access of a member of the council not to accounts but to documents and opinions relating to pending litigation. The Barnes Borough Council had come into conflict with the Ranelagh Club in connection with certain town-planning questions. The council entered into an agreement in 1935, the details of which are irrelevant. In February 1938 a writ was issued against the

borough council at the suit of the Attorney-General on the relation of the president of the Barnes Ratepayers' Association. It was resolved by eighteen votes to one that the town clerk should be instructed to enter an appearance to the writ, and that a special committee should be set up to consider the whole matter and to take counsel's opinion, and to take the necessary steps to defend the action. Mr. Conlan was proposed as a member of the special committee, but he refused to serve on it. Mr. Conlan was strongly opposed to the attitude and the policy of the Barnes Borough Council, and later, through his solicitor, made attempts for information to be supplied to him. He required to see the draft case prepared for counsel, and asked for information on various other points. This information was refused to him on the ground that it was not required in order to enable him to discharge his duties as a councillor, and that to disclose such confidential matters to a member who had violently opposed the decision of the council would be detrimental to its interests. Mr. Conlan thereupon brought this action in order to enforce what he regarded as his rights to the inspection of all documents in possession of the council. Mr. Justice Humphreys stated in the Divisional Court: "The common law right of a councillor to inspect documents in the possession of the council arises from his common law duty to keep himself informed of all matters necessary to enable him properly to discharge his duty as a councillor. There must be some limit to this duty. To hold that each councillor of such a body as, for instance, the London County Council, is charged with the duty of making himself familiar with every document in the possession of that body would be to impose an impossible burden upon individual councillors. The duties are, therefore, divided amongst various committees and sub-committees. In our judgment it is plain that 'a member of a borough council has no right to a roving commission to examine books or documents of the corporation because he is a member of the council. I quite agree that mere curiosity or wish to see documents is not sufficient'." The Court held that Mr. Conlan had not, in the present case, been prevented from carrying out any duties falling upon him as a councillor by the failure to disclose to him the documents, and that while no useful result would follow from such a disclosure, the interests of the local authority in the pending litigation might be prejudiced.

Returns of Potato Marketing Board immune from disclosure.

Another case relating to the disclosure of documents was *Rowell* v. *Pratt*, [1938] A. C. 101. This concerned the Potato Marketing Board but the decision is of general interest. The Agricultural Marketing Act, 1931, under which the potato marketing scheme was made, states by section 17 that any person who discloses any information obtained by him in the exercise of any power conferred on him by the Act or in the exercise of any power conferred by the Act on any board, shall be liable on conviction to a severe criminal penalty. A proviso excludes the disclosure of any information for the purposes of legal proceedings under the Act or any scheme made thereunder. The plaintiff in the present case sued for the price of potatoes delivered by him to Pratt. At the trial the particular question was whether the plaintiff had planted a certain species of potatoes in a certain field on his farm in addition to similar potatoes planted in another area referred to in an agreement between the parties. In order to support his allegation the defendant desired to have produced the return which Rowell had made to the Potato Marketing Board, as required by the Agricultural Marketing Act, 1931, which would show the detailed acreage of potatoes planted in the various fields belonging to Rowell. He therefore subpœnaed the Potato Marketing Board to produce the return, but the official attending the Court claimed that it was a privileged document. The County Court Judge accepted this view and gave judgment for the plaintiff. The Court of Appeal reversed this decision on the ground that the Potato Marketing Board was not a government department, and that a return of the kind in question was not privileged from production in legal proceedings by virtue of section 17 of the Act. They therefore ordered a new trial. The House of Lords reversed the decision of the Court of Appeal and decided that the return was privileged from production in all legal proceedings except those which are specifically mentioned in the proviso to section 17 of the Act.

Ultra Vires

River pollution.

George Legge & Son, Ltd. v. *Wenlock Corporation*, [1938] A. C. 204. The matter in issue here was whether it is possible in law for a natural stream to become transformed into a sewer through the discharge of sewage into it, in contravention of the Rivers Pollution Prevention Act, 1876. The channel in question was admittedly not a sewer when the

Public Health Act, 1875, was passed. It was then a natural stream or watercourse, and the Public Health Act laid it down that the local authority should not be authorised to make a sewer to convey sewage into a natural stream until it had been rendered innocuous to the purity of the water. The following year, when the Rivers Pollution Prevention Act was passed, it became a statutory offence to cause sewage matter to flow into any stream. It was alleged that because the sewage had been discharged into the stream since 1876 it had changed its legal status and become a sewer. This was a somewhat fantastic proposition to argue, since the discharge of sewage into the stream was necessarily illegal after 1876. As Lord Macmillan observed in the course of his speech, it would be remarkable if it were possible to legalise the pollution of streams by contravening the Act intended to prevent their pollution. Nevertheless, it was sought to prove that a protected stream had become an unprotected sewer in law solely through infringements of the law designed to prevent that result. The answer given to the question by the House of Lords was therefore a decided negative.

Erection of caretaker's house on open space.

A case of some interest to local authorities in connection with parks and recreation grounds was *Att.-Gen.* v. *Poole Corporation*, [1938] Ch. 23. The defendant corporation had acquired a piece of land which was formerly the property of the trustees of Poole Harbour, who had been authorised to purchase it by a provisional order. When the land was conveyed to the Poole Corporation there was no money paid in consideration, but there was a covenant requiring the council to preserve the land "as an open space or a pleasure ground or recreation ground for the use of the public and to take the necessary steps to maintain the land as such". The corporation, having laid out the land as a recreation or sports ground with a bathing establishment and other facilities, proposed to build a house for a keeper or caretaker who would remain in residence thereon. This action, which was brought at the relation of persons interested in neighbouring property, sought to restrain the corporation from building such a dwelling. The question of law turned on the interpretation of the Open Spaces Act, 1906, s. 10, which provides that a local authority which has acquired any interest in or control over an open space shall maintain and keep it in a good and decent state; and for that purpose may enclose it with railings

or gates, etc., and do all such other things and employ such officers and servants as may be necessary to attain the purposes mentioned. The Court of Appeal held that the evidence showed that the construction of a caretaker's dwelling was reasonably necessary to enable the council to comply with the requirements of section 10 above mentioned, and the corporation was therefore acting within its powers.

Electricity supply to a railway outside the area.

Another case involving a question of *ultra vires* was *Att.-Gen.* v. *Liverpool Corporation*, [1938] Ch. 76. The point in issue was whether the Liverpool Corporation had the right to supply electricity to the London, Midland and Scottish Railway for certain specified purposes, or whether the railway should take its supply from the Corporation of Birkenhead. The London, Midland and Scottish Railway absorbed in 1928 the Wirral Railway Co., which passed through the areas of Birkenhead, Wallasey and Hoylake, but not through Liverpool. The London, Midland and Scottish Railway were proposing to electrify part of the Wirral Railway, and desired to obtain their electricity from Liverpool, which was offering much lower terms. The Ministry of Transport gave the necessary consent, but the relators in the present action contended that the Minister had no power to consent, and they brought this action to restrain the Liverpool Corporation and the railway company from giving effect to the arrangement. Simonds, J., dismissed the action and his decision was upheld in the Court of Appeal. The Master of the Rolls in his judgment dealt with a large number of complicated provisions contained in various Acts of Parliament and Statutory Orders, but, as no general principles emerged, a detailed scrutiny of these would not repay attention here.

An action will not lie to recover rates.

Another case in which the Corporation of Liverpool was engaged was *Liverpool Corporation* v. *Hope*, [1938] 1 K. B. 751. This case decided that a local authority could not bring an action to recover unpaid arrears of rates, the proper procedure being to apply for a distress warrant. One would have thought that so elementary a question as this would have been decided long ago, having regard to the fact that our rating system goes back for nearly three centuries. The rate, it was pointed out by Lord Justice Slesser, is not a Common Law liability, but a creation of statute, and therefore it is necessary to have recourse to the statutory remedy and to that alone.

Local Government Elections

Election petition in rural district council election.

A small point concerning time was decided in *Re Counter's Petition, Buckingham* v. *Counter*, [1938] 2 K. B. 90. The Court of Appeal, reversing the Divisional Court, held that where an election petition alleging illegal practices is presented against a successful candidate in an election of rural district councillors, it is permissible to leave out of account a bank holiday in computing the period of six weeks within which the petition must be presented. This matter, the Court held, is governed by the Local Government Act, 1933, s. 295, and not by the Municipal Election Petition Rules, 1888.

Housing

Definition of working-class house.

The meaning of working-class "house" in section 188 of the Housing Act, 1936, was discussed in *Trim* v. *Sturminster R. D. C.*, [1938] 2 K. B. 508. The word is defined in the statute as including any yard, garden, outhouses and appurtenances belonging thereto and usually enjoyed therewith. The local authority made a demolition order from which an appeal was made to the county court Judge on the ground that the house, together with ten acres of grassland which was occupied with it and formed part of the letting, was not a house suitable for occupation by persons of the working class within the meaning of the Housing Act. It appeared from a statement by the county court Judge that the premises consisted of a small dwelling-house, attached to which and forming part of the same occupation were ten acres of grassland, cow stalls for about a dozen cows and other farm buildings. The county court Judge took the view that no member of the working class would either take this house and its appurtenances on an annual tenancy or be accepted as a tenant by the owner. He had based his conclusion on the notion that the "house" was to be taken to include not only the dwelling, but also the ten acres of grassland, the cow stalls, etc. The Court of Appeal decided that this was wrong in law. No case was cited in which the word "appurtenances" had ever been held to include land not falling within the curtilage of the yard of the house itself. The result was that the county court Judge should not have included the ten acres of grassland, although just how much

of the adjacent land should be included in the word " appurtenances " would depend on the circumstances of the case. It might include orchards, yard, garden, etc. The Court of Appeal ordered the case to go back with a direction to the county court Judge to reconsider his decision on the lines mentioned above.

LITERATURE

The Administrative Process. By James M. Landis. New Haven. Yale University Press, and Humphrey Milford. 1939. 160 pp. 9s.

This short and interesting book is based on the lectures given recently on the Storrs Foundation by the new Dean of the Harvard Law School. The author was formerly a member of the Federal Trade Commission, he was one of the authors of the Social Securities Act, and was Chairman of the Securities Exchange Commission. He has, therefore, had close personal experience of the matters with which he deals. A critic might suggest, indeed, that he had drawn too exclusively on the experience of the Federal Trade Commission and the Securities Exchange Commission, two bodies which, although of the first importance, only cover a small part of the field. It is, however, highly significant that a Dean of Harvard Law School should have been actively associated with the new administrative agencies by which the Government regulation of business is being effected in the United States, and it is still more striking to find how strongly he favours administrative agencies as compared with judicial bodies. The full implications of Mr. Landis's position can only be grasped by those who are familiar with the report of the President's Committee on Administrative Management which was issued in 1937 and the storm of controversy which followed its appearance. A great part of the discussion centred round the Committee's attack on the many independent administrative agencies of the Federal Government, which were denounced as being " a headless ' fourth branch ' of the Government, a haphazard deposit of irresponsible agencies and unco-ordinated powers ".

Dean Landis comes forward as a champion of these independent agencies: agencies which are engaged, be it

noted, in exercising regulatory functions rather than in providing services. In his analysis, Dean Landis points out that the rise of industrialism and the rise of democracy in the expanding civilisation of the late nineteenth and twentieth centuries have created a need for new methods of government different from those which have served us in the past. The separation of powers laid down by Montesquieu is not merely inadequate as a plan of government, but the triad of functions enumerated by him is too limited for contemporary needs. In private business, he contends, we should never dream of organising an industrial undertaking on Montesquieu's lines. Yet the problems of operating a private industry resemble in great degree those entailed by its regulation, and therefore the separation of powers needs to be abandoned as a principle for regulatory commissions on grounds of its basic inefficiency. Political conceptualism must be replaced by a realistic concern for the economic health of industry and the welfare of the community. Only by the administrative process can banking, insurance, public utilities, shipping, transport, and other industries suffering from various maladies be sufficiently cured to serve the public in a satisfactory manner.

The administrative process, as Dean Landis conceives it, requires a full measure of authority to enable it to plan, to promote and to police, and it embraces "an assemblage of rights normally exercisable by government as a whole". Hence, the regulatory commission must receive legislative, judicial and executive functions within its own sphere of competence. On this point Dean Landis is both emphatic and explicit. In his view the need for expert knowledge is so overwhelming that not only must the expert commission be trusted with large governmental powers of all kinds, but there is no other organ of government, whether the Courts of law or the Legislature, which has sufficient knowledge of the subject-matter to be worthy of exercising overriding powers by way of appeal or review.

Dean Landis criticises the judicial process as exercised by the regular Courts of law on several grounds as an instrument for regulating industry. One ground is its inability to maintain a long-time persistent interest in a clearly defined area of economic or social activity. Another is its inability to initiate action. A third is the necessity of deciding a controversy on the basis of the recorded evidence, even where that is hopelessly insufficient. The Judges' insistence (in

dealing with rate-making in the field of public utilities) on reviewing administrative determinations of facts as well as of law, has brought the regulatory process in that sphere into contempt. A similar observation is made in regard to the judicial review of Workmen's Compensation decisions. In the result, Dean Landis declares, "the administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power."

This outspoken and courageous book is written with zest and conviction. There are many important questions and objections which it does not attempt to answer or even to mention, and some of these objections would be raised by those who possess what may be called a modern attitude towards public administration. But here one need do no more than commend to every public lawyer in the English-speaking countries the study of a most stimulating essay.

The Principles of English Law and the Constitution. By O. Hood Phillips. London: Sweet & Maxwell. 1939. 610 pp. 21s. net.

With so many books on constitutional law already in the field, one looks at a new work on the subject with considerable care to see what advantages it can claim to possess. Mr. Phillips' book, it should be noted, is not a treatise on the law *of* the Constitution, but a treatise on English law *and* the Constitution, and the relations between them. It is intended for intermediate students in laws, for those taking the examinations of such bodies as the London Chamber of Commerce and the Royal Society of Arts, and also for the general intelligent reader, whose intelligence, the author wittily remarks, is shown by his avoiding examinations in law altogether.

The work is planned on an ambitious scale which is beset with many difficulties. An introductory chapter hastily reviews a number of theories concerning law and the State without arriving at any general conclusion beyond the questionable observation that "the purpose of law may be conceived as the protection of rights (Conservative and Liberal), the enforcement of duties (oriental), or the satisfaction of needs (socialistic)" (p. 29). Part I expounds the English legal system in terms of its sources, elements and

classification. Part II gives a straightforward account of the Constitution of the United Kingdom. Part III is devoted to the constitution of the British Empire both internally and in relation to international law.

It is difficult to see what advantages are gained by combining a disquisition on the entire English legal system with a treatise on English constitutional law. Why should the student of public law be asked to acquire a smattering of private law and jurisprudence in the course of studying the constitution? It is not necessary to understand the law of torts in order to grasp the essentials of the Cabinet system. A graduate in laws must no doubt comprehend a wide range of both private and public law; but it would seem better to study each department thoroughly rather than to attempt the whole thing through the medium of an *omnium gatherum*. The plan adopted in the present work tends to disperse both the energies of the author and the interest of the reader.

The author's views on certain controversial points are not always easy to ascertain. For example, he tells us that the legislative function consists of the making of new law, and the alteration and repeal of existing law; while the executive or administrative function is the carrying on of government according to law. But what does "law" mean here? Does it refer to general rules dealing with large classes of the community, or is it equally applicable to decisions relating to particular instances? Is it the newness of a decision which determines whether it is legislative or executive in character? What is the status of an administrative decision which is not "according to law": as, for example, an *ultra vires* act, or the ukase of a dictator? Or would Mr. Phillips say that every whim of a dictator is necessarily "according to law"?

Again, he defines local government as including "all forms of public administration within sub-divisions of the area of a sovereign State, whether that administration is exercised by locally elected bodies or by State officials" (p. 50). Yet shortly afterwards he asserts that local government authorities must be in some degree independent of the central government, for otherwise there would be no distinction between them. Has not the author overlooked the difference between decentralised and deconcentrated administration?

Mr. Phillips is a strict legal purist in dismissing as irrelevant to the lawyer all questions which he conceives to be of a political character. Thus he refuses to discuss the

question of whether the powers conferred on public authorities are too extensive (pp. 63, 304); and he regards the Rule of Law as no more than a rule of politics. He points out, however (on p. 294), that Cabinet Ministers are selected by the Prime Minister from among the most influential and capable members of his party. Yet surely this is a rule of politics rather than of law?

A book which can raise so many interesting points for discussion—and disagreement—is likely to be stimulating both to the student and to the discriminating teacher.

The Public Corporation in Great Britain. By Lincoln Gordon. Oxford University Press. ix and 351 pp. 16s.

This is an admirable volume of studies by an American post-graduate student of Oxford University on the Port of London Authority, Central Electricity Board, British Broadcasting Corporation and the London Passenger Transport Board. Dr. Gordon has an acute power of observation and a first-rate talent for research. He has collected an extraordinary amount of significant information relating to these bodies, and he presents studies which are comprehensive without being too long. He has a lively style and a pungent critical sense, but on the whole he takes a favourable view of the constitutional development reflected in these new organs of public administration. This is a book of great interest to the student of Administrative Law. It is probably the best study of English institutions which has been made by an American social scientist.

The Law of Fire Brigades and Air-Raid Precautions. By R. Wynne Frazier. London: Solicitors' Law Stationery Society, Ltd. xxxvii and 440 pp. 15s.

The reader of the Administrative Law Section of the present volume will already have noticed, under the heading of "Legislation", an account of the recent legislation relating to fire brigades and air-raid precautions. The new law on the one hand, and the immensely enhanced importance which these services have assumed in the life of the community on the other, make a second edition of Mr. Frazier's book on the law of fire brigades a welcome addition to legal literature. Public lawyers and municipal officers alike will turn with relief to his lucid and comprehensive treatise. The extent of the

law on the subject is shown by the fact that the book occupies no less than 440 pages. One would have wished that the author had explained his views on the actual functions which it is intended that the Fire Services Commission should fulfil, as this is certainly a very obscure part of the legislation.

The Coal Act, 1938. By F. A. Enever. London: Solicitors' Law Stationery Society, Ltd. xl and 496 pp. 37s. 6d.

The Coal Act, 1938, and Associated Statutes, Rules and Forms. By David Bowen, K.C. London: Hamish Hamilton (Law Books), Ltd. xlviii, 466 and 26 pp. 42s.

The far-reaching effects of the nationalisation of coal royalties and the increased powers given in consequence to the new Coal Commission make the Coal Act, 1938, highly important. The difficulties of the Act are so formidable that it cannot be said that two separate treatises, both by learned authors of high repute, constitute an *embarras de richesse.*

Mr. Enever is legal adviser and registrar of the Coal Commission itself, so that although he expressly states that his views are not to be treated as binding on the Commission, they are nevertheless to be regarded with the utmost respect. His book covers nearly 500 pages, but many people will find that the most valuable feature of it is a series of lengthy introductions to the various statutes explaining their complex provisions in relatively simple language. The introduction to the Act of 1938 occupies nearly ninety pages, and is a model of clearness and accuracy. Mr. Enever also includes in his volume the Coal (Registration of Ownership) Act, 1937, and he adds the texts of such relevant statutes as the Mines Act, 1928, the Mining Industry Act, 1926, and the Coal Mines Act, 1930, all with the relative amendments to bring them up to date. In his appendices he includes twenty-two forms or sets of rules of one kind or another. His book will clearly be of great value both to the coal owner, the members of the legal profession advising the coal owner, and the public official engaged in administering the new system, not to mention the teacher of law who desires to expound it. There is a note of commendation by way of introduction by Sir Ernest Gowers, Chairman of the Coal Commission.

Another treatise on the Coal Act is by Mr. D. Bowen, K.C., who was formerly head of the Mining Department of the

University of Leeds. Mr. Bowen is already well known as a contributor to *Halsbury's Laws of England* on the subject of mines, minerals and quarries, and he is also the author of a book on that subject. The present work is almost of the same length as that by Mr. Enever, and is also of high quality. The explanatory introduction is somewhat shorter, and extends to only fifty-seven pages. In both books it would have been advantageous to have had sidenotes inserted in the text.

This is the first volume which has come to our notice published by Hamish Hamilton Law Books. If it is a sample of the quality which may be expected from that house, we shall watch their list with interest.

The Complete Law of Housing. Third edition. By H. A. Hill. London: Butterworth & Co. and Shaw & Sons. xl, 719 and 44 pp. 30s.

This book is the third edition of Mr. Hill's treatise on housing. The necessity for a new edition will be understood by everyone who is familiar with the course of housing legislation. The law relating to housing was consolidated by the Housing Act, 1936, which repealed no less than twelve statutes in whole or in part. The present edition includes the exposition of that statute and the Acts prior to it still remaining on the Statute Book. Since then, however, we have had further important legislation, of which two examples are described under the heading of "Legislation" in this Section of the *Annual Survey*. It appears, therefore, almost impossible to attempt to be completely up to date in this ever-moving social service, so rapidly does Parliament pursue or change its policies. Nevertheless, even without the most recent statutes, Mr. Hill's work occupies the formidable length of 700 pages. He has had much practical experience of housing work and local government generally in practice at the Bar, and the present book has justly acquired a high reputation.

Byelaws of Local Authorities. By A. Norman Schofield. London: Butterworth & Co. 1939. l and 367 pp. 30s.

The enacting of subordinate legislation by local authorities is a matter of great and increasing importance in this country. A large number of statutes contain provisions conferring on

local authorities powers to make bye-laws, and a substantial body of case law applies to the mode of exercising these powers.

Many professional treatises on local government deal with the question of bye-laws to some extent, but this is the first book to be devoted entirely to the subject from a legal standpoint. Its usefulness is enhanced by the fact that the Public Health Act, 1936, has introduced considerable changes in this branch of the law. The new Act requires (*inter alia*) all local authorities to make fresh building bye-laws within a comparatively short time. It cancels all bye-laws of specified kinds in regard to the water supply if they are more than nine years old, and provides that in future such ordinances shall have a maximum duration of life of ten years. It introduces several notable changes in procedure, and extends the power of making bye-laws to new spheres.

The plan of Mr. Schofield's book is as follows. Part I deals in successive chapters with the definition of a bye-law, the power to make bye-laws, their validity, the making and confirmation of them, proof, repeal, waiver or relaxation, enforcement, and miscellaneous matters. Part II expounds the statutory provisions and case law concerning bye-laws relating to particular topics, arranged alphabetically under the various heads. The third part contains references (the provisions are not given *in extenso*) to bye-law powers conferred on local authorities by private Acts. It will be seen that the book is comprehensive in scope. The author appears to have done his work with thoroughness and accuracy.

Attention is drawn in the introduction to the enlarged powers of central control operating in this field. The new Public Health Act gives the Minister of Health the power to make bye-laws in regard to buildings and sanitation in default of the local authority, and to cancel bye-laws which may unreasonably impede the erection of any buildings. The Minister may revoke a bye-law regardless of whether or not the local authority consider it unreasonably obstructive. The local authority, on the other hand, can relax or dispense with compliance with a bye-law in a particular case only with the consent of the Minister. It is provisions of this type which lead the author to conclude that "the powers of local authorities are becoming so curtailed and controlled by the central government that to some extent local authorities have become the mere agents of the central government". This statement

might be still further borne out if inquiry were made into the pressure exercised by central departments on local authorities, when seeking confirmation of their bye-laws, to follow more or less slavishly the so-called "model bye-laws" issued by the former, which are, in fact, no more than the Whitehall version of how powers conferred by Parliament on local elected councils should be exercised.

Mr. Schofield's book is a useful addition to the library of local government law.

An Introduction to the Law of Local Government and Administration. Second edition. By Sir William E. Hart and William O. Hart. London: Butterworth & Co. lvii and 752 [78] pp. 21s. net.

A second edition of this excellent book is a welcome addition to the relatively small amount of literature which is suitable for university teaching in the field of local government and public law. The first edition appeared in 1934. The rapid expansion of the scope of public administration may be gauged from the fact that the new volume includes thirty-seven new statutes which have been passed during the last four years, including such important measures as the Public Health Act, 1936; the Air-Raid Precautions Act, 1937; the Local Government Superannuation Act, 1937; and the Fire Brigades Act, 1938. There are also about seventy or eighty new cases referred to in the present edition, which has been expanded by nearly fifty extra pages of matter.

FAMILY LAW AND THE LAW OF PERSONS

Again it has to be recorded that the Legislature has made a more notable contribution to the development of Family Law than the Courts. The chief interest of the 1988 case law lies in the interpretation and operation of the Matrimonial Causes Act, 1987. Particularly noteworthy is the number of cases on desertion, which is now of greater importance as being a ground for divorce.

LEGISLATION

By the *Inheritance (Family Provision) Act*, 1988, the English Legislature has for the first time introduced a limitation on freedom of testation in the interests of the testator's family. English law has chosen the method of judicial discretion in preference to that of fixed portions, or legitim, which is preferred in the majority of those jurisdictions which impose a limitation (see *Modern Law Review*, Vol. I, No. 4, p. 299). The statute is discussed fully elsewhere in this *Survey* but a short comment on a measure of such significance for the family must be made here. There is some inconsistency in the treatment of the sexes. Thus, while provision may be made under the Act for a surviving husband, daughters are more favourably treated than sons. Provision for a son or sons is limited to minority, but in the case of a daughter it continues until marriage. No application may be made where the testator has bequeathed not less than two-thirds of the income of the net estate to a surviving spouse and the only other dependants, if any, are the children of that spouse; so that apparently an application might be made in favour of children of the testator by a previous marriage. The provision is by an income allowance not exceeding two-thirds of the annual income of the net estate (including any benefits taken under the will) if there is a surviving spouse and one or more other dependants, and half the income if there is a surviving spouse only, or children only. Where the testator's estate is small and does not exceed £2,000 net the Court may order provision for maintenance by a capital payment.

The discretion given to the Court is a very wide one and may prove embarrassing. *Inter alia* the Court is to have regard to the conduct of the dependant in relation to the testator or otherwise or to any other matter that the Court may consider relevant or material in relation to that dependant, to the beneficiaries under the will, or otherwise. S. 1 (6).

The provision is to be "reasonable", though it is not quite clear what is to be the standard of reasonableness; presumably the word will have to be construed in somewhat the same way as the word "necessaries", as meaning reasonable having regard to the circumstances of the deceased and to the standard of life of the family. Finally it may be noted that adopted children are expressly included within the operation of the Act. S. 5 (1).

Every person who, after July 1, 1938, in accordance with the Registration Acts registers any birth, still-birth or death must, by virtue of the *Population (Statistics) Act*, 1938, furnish the following additional information: 1 & 2 Geo. 6, c. 12.

1. On registration of a birth or still-birth :—(*a*) the age of the mother, (*b*) the date of the marriage, (*c*) the number of children of the mother by her present husband and how many are living, (*d*) the number of her children by any former husband and how many are living.

2. On registration of death :—(*a*) if the deceased was a male, whether he had been married and, if so, whether he was married at the date of his death; (*b*) if the deceased was a woman and had been married, (i) the year in which she was married and the duration of the marriage, (ii) whether she had children by her husband or any former husband, (iii) the age of the surviving spouse, if any, of the deceased.

The *Administration of Justice (Miscellaneous Provisions) Act*, 1938, s. 14, confers on the High Court power to vary, suspend, and revive orders for alimony or maintenance made under the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 187, 190 (2), 190 (3), 190 (4), and 191 (2). In exercising these powers the Court must have regard to all the circumstances of the case, including any decrease or increase in the means of either of the parties to the marriage. The result of those provisions is to apply to all the sections in question the proviso (*a*) to section 190 (2) of the Act of 1925. 1 & 2 Geo. 6, c. 63.

Practice Note

If an application for settlement of the wife's property or variation of marriage settlement is referred by the Registrar, under Matrimonial Causes Rules, r. 53, or is adjourned, under rule 54 (1), to the Judge the further hearing will be in open Court. If a party seeks to vary the Registrar's report he must serve a notice on the other party specifying the variation sought: *Practice Note*, [1938] W. N. 282.

Dated May 27, 1938.

CASE LAW

Matrimonial Causes

Desertion: Matrimonial Causes Act, 1937, s. 6;

In *Johnson* v. *Johnson*, [1938] 3 All E. R. 765, Hodson, J., decided a short point arising out of the provisions of section 6 of the Matrimonial Causes Act, 1937. The wife in this case had deserted her husband in November, 1933. On September 18, 1937, the husband presented a petition for judicial separation based on his wife's desertion for more than two years. After the wife had entered an appearance, the husband withdrew the petition. On February 10, 1938, the husband presented a petition for divorce based upon his wife's desertion for three years immediately preceding the presentation of the petition. It was argued that the presentation of the petition for judicial separation had the effect of putting an end to the desertion (*Stevenson* v. *Stevenson*, [1911] P. 191), with the result that the petitioner had failed to prove desertion for three years immediately preceding the presentation of his divorce petition. Hodson, J., pointed out that had the petitioner presented his petition for judicial separation and obtained a decree, he could, by virtue of section 6 of the Act of 1937, have presented a petition for divorce and relied on the period of desertion immediately preceding the presentation of the former petition. The learned Judge refused to perpetrate an anomaly by holding that the petitioner was in a worse position because he abandoned the petition for judicial separation and started new proceedings on substantially the same ground. Where, however, a petition for judicial separation or for divorce is presented before the period of three years has elapsed, the position is still governed by *Stevenson* v. *Stevenson*, *supra*,

i.e., the presentation of the petition puts an end to the desertion, because the desertion, while the petition is on the file, is not "without cause". Consequently, no subsequent petition for divorce based on desertion for three years partly before and partly after the original petition will succeed: *Marthews* v. *Marthews*, [1938] 4 All E. R. 377; *Walton* v. *Walton*, [1938] 4 All E. R. 382. This principle is again affirmed in *Chapman* v. *Chapman*, [1938] P. 93, where Hodson, J., held, however, that a husband cannot by his own act of bringing proceedings for divorce prevent desertion running against him. Nothing which the wife does afterwards by the presentation or prosecution of her proceedings alters the case, even where, in her answer, she prays for the dissolution of the marriage.

In *Bush* v. *Bush*, 55 T. L. R. 194, the President expressed his entire agreement with the decisions in the *Marthews* and *Walton Cases*, but was not satisfied that the reasoning in *Johnson* v. *Johnson* based upon the Matrimonial Causes Act, 1937, s. 6, was sound.

adultery as discretionary bar;

Another important point on desertion was decided in *Herod* v. *Herod*, [1938] 3 All E. R. 722. This was a husband's petition for divorce upon the ground of desertion for three years immediately preceding the presentation of the petition. The petitioner asked for the discretion of the Court to be exercised in his favour with regard to adultery committed by him during the period of the alleged desertion and continuing during practically the whole of the statutory period. This adultery was apparently not known to the wife and, in any case, it was quite clear that she was indifferent on the subject. These facts raised the important point of law whether a petitioner who has committed adultery since the commencement of the alleged desertion—and, in particular, during the three years immediately preceding the presentation of the petition—is precluded from alleging that he or she has been deserted without cause for the statutory period, or whether the granting of the decree is in such cases in the discretion of the Court. It is interesting to note that in Australia, where legislation similar to the Matrimonial Causes Act, 1937, has been in force for some years, there has been an acute conflict of judicial opinion on this point, culminating in a recent decision of the High Court of Australia dismissing a petition on the ground that the adultery of the petitioner was an absolute bar: *Gilbert* v.

Gilbert, [1937] S. A. S. R. 79; and, in Scotland, where divorce for desertion has been the law for nearly four centuries, the same rule prevails. The point has never been the subject of decision under the purely statutory jurisdiction of the Court, although no petition in this country based on the principles and rules of the ecclesiastical Courts could possibly succeed on the facts of this case. Sir Boyd Merriman, P., in the course of an elaborate judgment, came to the conclusion that the adultery of the petitioner was a discretionary bar only and that, on the facts of this case, a decree *nisi* ought to be granted. The learned Judge refused to regard the matter as concluded by section 4 of the Act of 1937 which provides that adultery "during the marriage" shall be a discretionary bar only, without discriminating between the several grounds for divorce. "In relation to a petition for desertion this latter provision would be apt to refer to the common case of adultery antecedent to the alleged desertion and already condoned" (at p. 729). The problem would have been the same if, before 1938, an adulterous wife had sought dissolution of the marriage, under the Matrimonial Causes Act, 1857, on the ground of desertion for two years or more coupled with adultery. Thus, before 1938 the position was anomalous. For, under the Act of 1857, although an adulterous wife could obtain a divorce on the ground of desertion coupled with adultery, she could not obtain a decree of judicial separation for the same desertion alone since the Court was, by sections 16 and 22 of the Act of 1857 (cf. Judicature Act, 1925, s. 185 (1) (2)) enjoined, in exercising this jurisdiction, to act on the same rules and principles which would have been applied by the ecclesiastical Courts, and the ecclesiastical Courts quite clearly would have refused relief to an adulterous wife. Sir Boyd Merriman, P., expressed the opinion *obiter* that the Act of 1937 has brought about an important change in this respect in that by section 5 it assimilates the reliefs of judicial separation and divorce by making both subject to the statute only and independent of the principles and rules upon which the ecclesiastical Courts acted.

"without cause".

Another argument put forward by the respondent in this case was that desertion cannot be "without cause" if the petitioner has been guilty of adultery; that this matter is to be judged objectively and on proof of adultery by the deserted spouse the desertion *ipso facto* ceases to be "without cause",

i.e., it ceases to be desertion at all. This argument was rejected by the learned President who thought it "impossible to hold that adultery of which the deserter is proved to be entirely ignorant, or to which, if it is known, he or she is proved to be entirely indifferent, can have affected his or her own intention in the matter". The question of "cause" is, therefore, to be determined subjectively and not objectively. Precisely the same considerations would apply where the adultery preceded the alleged desertion.

Constructive desertion.

It would appear from *Boyd* v. *Boyd*, [1938] 4 All E. R. 181, that the text-book definitions of constructive desertion are drawn too wide. It is usually stated that desertion by the husband—and presumably by the wife—may be constituted by the adoption of conduct which renders cohabitation unbearable. In *Boyd* v. *Boyd*, Bucknill, J., decided that intention to bring the cohabitation to an end is an essential element of desertion. "Before there can be a case of constructive desertion the Court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive the wife away" (at p. 182). This is a harsh *dictum*, because, as in the instant case, the offender may wish to approbate and reprobate, to get the best of both worlds by making cohabitation unbearable to the other spouse although still desired by the offender. A better course to take it seems, with respect, would be to say as Gorell Barnes, J., said in *Sickert* v. *Sickert*, [1899] P. 278, that the offender must be taken to intend the natural consequences of his/her conduct, *viz.*, that the other spouse will cease to live with him/her.

Condonation, collusion and connivance, burden of proof.

The variation of section 178 of the Supreme Court of Judicature Act, 1925, by the Matrimonial Causes Act, 1937, s. 4, has effected important changes in the burden of proof of condonation, collusion and connivance. Formerly the burden of proving condonation, collusion or connivance lay on the party alleging it, and in the case of connivance there was a presumption of law against its existence. Section 4 of the Matrimonial Causes Act, 1937, provides that the Court must be satisfied that no collusion, connivance or condonation exists. It has now been decided that the effect of this section is to alter the burden of proof both in the case of condonation (*Germany* v. *Germany*, [1938] P. 202) and of connivance (*Poulden* v. *Poulden*, [1938] P. 63). In the former case Langton, J., pointed out that "the revolution

is not quite so striking on the question of condonation as it is on the question of connivance because . . . there was a presumption of law against the existence of connivance before this Act, and that presumption has been swept away".

Condonation and changing social conditions.

Langton, J., in the same case pointed out how changing social conditions must affect the Courts' interpretation of the definition of condonation. It is clearly established that forgiveness must be coupled with restoration of the offending party to the same position he or she occupied before the offence was committed. When persons who sought divorce were all well-to-do people there was a relatively simple test of restoration—had the offending party been taken back into the residence of the forgiving party? That test is not now conclusive. At the present day people of all ranks and conditions come to the Courts, many of them compelled to live for long periods in different houses. All the circumstances must, therefore, be looked at and condonation may be inferred by reference to other facts of married life. The learned Judge adopted this course in the instant case where the husband was a doctor acting as *locum tenens* for another doctor and living in the latter's house. It was impossible for him to take his wife into the house with him and for various reasons it might have been inadvisable for him to go into fresh lodgings.

Collusion.

Where money payments have been made by one party to the other for the purpose of furthering divorce proceedings there is a strong suspicion of collusion, and the Court will examine carefully the circumstances under which the payments were made. But if the payments are made for the purpose of facilitating the progress of the cause and of removing financial difficulties which may obstruct them there is no collusion. In *Beattie* v. *Beattie*, [1938] P. 99, a husband had for some years been attempting to bribe his wife to divorce him. In 1936 the wife decided that it was then desirable in her own interest to be free. She accepted a sum of money from her husband to be applied to payment of the costs of bringing a petition. This arrangement was not at the time disclosed to the solicitors for the parties, but it was ultimately disclosed to them and to the Court. This case caused Sir Boyd Merriman, P., "the gravest anxiety", having regard to the duty cast upon the Court by the Matrimonial Causes Act, 1937, s. 4, "not indeed for the first time, though it may be that the burden of satisfying the

Court is more strongly placed upon the parties". The learned Judge, laying down the principles set out above, ultimately came to the conclusion that the petitioner never really made any bargain at all and that the proceedings would have been commenced in any case.

Connivance.

Lloyd v. *Lloyd*, [1938] P. 174, does not add anything to the generally accepted definition of connivance by Lord Westbury in *Gipps* v. *Gipps*, 11 H. L. C. 1, 14, but the case is notable for yet another remarkable judgment by Langton, J. The learned Judge subjected the authorities to an exhaustive scrutiny and came to the conclusion that the definition in *Gipps* v. *Gipps* is "the nearest thing I have had to a definition of connivance". In the instant case the petitioner's wife had committed adultery with two men to the husband's knowledge, the adulteries having been condoned. In September 1935 the petitioner had become aware of his wife's adulterous association with a third man, the co-respondent; his wife repeatedly refused to give up the co-respondent, but husband and wife had repeated intercourse thereafter until June 1936, when the petitioner decided to take divorce proceedings, having made up his mind that his wife's affections had passed to the co-respondent. His petition was dismissed on the ground of connivance. In order to establish connivance it is not necessary to prove that the husband actually intends, "in the sense of desiring, indeed ready to promote, adultery". The test is: "Did the petitioner acquiesce by wilfully abstaining from taking any active steps to prevent an adulterous intercourse which he could but believe or reasonably suspect was likely to occur?" In the course of his judgment Langton, J., concurred in the view expressed by Hodson, J., in *Poulden* v. *Poulden*, *supra*, that, whereas before the Act of 1937 became law the burden of proof of connivance alleged by a respondent lay upon that respondent, now, where the circumstances of the case suggest connivance, the burden is upon the petitioner to satisfy the Court that there was no connivance.

Petition for separation dismissed by consent prior to 1938. Divorce proceedings based on same allegations

The case of *Goldblum* v. *Goldblum*, [1938] W. N. 333, is of considerable importance to married persons living apart under separation agreements who wish now to take advantage of the Act of 1937. In 1933 a wife petitioned for judicial separation, alleging cruelty. In 1934, before the petition had come on for hearing, the parties entered into a separation deed, and the petition, in accordance with a provision in the

agreement, was dismissed by consent. In May 1938 the wife presented a petition for divorce based on adultery, and repeating in terms the allegations of the earlier petition. The husband contended that the wife was precluded by the provisions of the separation deed from taking any proceedings in the Divorce Court, and, in any event, was estopped from proceeding on the allegations of cruelty which had formed the basis of the earlier petition. The Court of Appeal held, on the construction of the deed, that the wife had not agreed not to bring further proceedings in the Divorce Court and that the agreement to withdraw the petition did not amount to a withdrawal of the charges in the petition. This case can be usefully contrasted with *H.* v. *H.*, [1938] 3 All E. R. 415, where, in similar circumstances, the deed provided that all charges of cruelty should be withdrawn and it was held that those charges could not be relied upon in later divorce proceedings, although those proceedings were not of the same nature.

In *Goldblum* v. *Goldblum*, there was a formal order for dismissal; the mere existence of that formal order did not strengthen the husband's contention. The position would have been exactly the same if the formal step of obtaining an order had never in fact been taken, as it was not taken in *H.* v. *H.*

Divorce petition founded on incurable insanity; inquiries of Official Solicitor acting as guardian *ad litem*.

Timins v. *Timins*, [1938] 4 All E. R. 180, was a petition based on section 2 (*d*) of the Matrimonial Causes Act, 1937, for divorce on the ground of incurable unsoundness of mind. The importance of the case is that the Court approved the line of inquiry pursued by the Official Solicitor acting as guardian *ad litem* for the respondent and ordered the costs of the inquiry to be paid by the petitioner. The sanctioned inquiries were: (1) whether the respondent's illness had been caused by the petitioner; (2) whether the petitioner's conduct was such that a cross-petition might be filed, or that the petitioner ought to file a discretion statement; (3) the medical history of the respondent; (4) the petitioner's means; (5) an independent medical report on the respondent's mental condition.

Separation agreement: effect of decree of nullity.

In *Fowke* v. *Fowke*, 54 T. L. R. 801, Farwell, J., considered the effect of a decree of nullity on a separation agreement entered into between the parties prior to the decree. The separation agreement was entered into in 1931, the husband agreeing *inter alia* to pay his wife an annuity of

£960. The husband paid the annuity down to the date of his death. In 1933 the husband obtained a decree of nullity on the ground of his wife's incapacity to consummate the marriage. On the death of the husband his personal representatives repudiated any further liability under the agreement, contending (*a*) that the decree of nullity put an end to the separation agreement; (*b*) that the agreement was entered into under a common mistake of the parties that they were in truth husband and wife; and (*c*) that in the circumstances there was a total failure of consideration, as the whole basis of the agreement was that the parties were married. Farwell, J., in, it is submitted with respect, a none too happily worded judgment rejected all these contentions. The learned Judge, though drawing the relevant distinction, made no use of the terms voidable and void which are so valuable in considering the effects of a decree of nullity. Where a marriage is voidable then there is a valid and subsisting marriage until the proper steps are taken to set it aside and, although the decree is retrospective, it is well established that the *de facto* marriage must for many purposes be recognised by the Courts. Thus, it was not true to say that the relationship of the parties was so different from that of married people as to render this agreement one for which there was no basis. Furthermore, at any time before the decree, the husband was liable to maintain his wife and his wife was entitled to pledge his credit if he did not provide her with maintenance. By the agreement he was freed from this liability and this immunity was valuable consideration for the promise to pay the annuity. In so far as there was any mutual mistake, it was a mistake of law and not of fact, since both parties knew the relevant fact, *viz.*, that the marriage had not been consummated.

Order for security for costs.

In *Halls* v. *Halls*, [1938] 4 All E. R. 573, a wife respondent had been granted a limited certificate under the Poor Persons Rules, *i.e.*, limited to such proceedings as were necessary to enable her to obtain security for costs. She made the application for security under Matrimonial Causes Rules, 1937, r. 74 (3), and the Registrar made an order limiting the security to the sum of £3 upon the hypothesis or forecast that if the Poor Persons Committee were thereafter approached they would give the wife further assistance. The Court of Appeal held that the Registrar had acted upon a wrong principle. The effect of his order would be to throw

upon those who assist professionally in poor persons' cases the burden of litigation by the husband, for which the husband, not being a poor person, was capable of paying, and for which, according to ordinary practice, he would be ordered to pay.

Further answer to petition is part of the original petition.

A further answer to a petition for divorce is part of the original petition; it cannot stand by itself. Consequently, an answer or further answer to a petition presented before the Matrimonial Causes Act, 1937, came into force is part of the original petition, and so a prayer for divorce on the ground of desertion cannot properly be included in it: *Chapman* v. *Chapman*, [1938] P. 93. (Also cited elsewhere in this section on other points.)

Nullity: jurisdiction of English Court.

The case of *Hussein* v. *Hussein*, [1938] P. 159, is interesting on account of the peculiarity of the facts and as an illustration of the principle that where a marriage is void —in the instant case the marriage was induced by threats— an English Court is competent to entertain a suit for annulment of the marriage if the ceremony took place in England, notwithstanding that the *de facto* husband was at the time of the suit domiciled in Egypt (cf. Dicey, Conflict of Laws (5th ed.), r. 65 (1), p. 294).

Fresh evidence on behalf of petitioner on intervention by King's Proctor.

The facts and actual decision in *Thompson* v. *Thompson*, [1938] P. 162; [1939] P. 1, are of less importance than two incidental points which arose out of the proceedings. The first question was how far fresh evidence on behalf of the petitioner should be admitted on the hearing of a subsequent intervention by the King's Proctor. In *Oldschool* v. *Oldschool*, The Times, March 17, 1938, Langton, J., refused to hear any fresh evidence at all on behalf of the petitioner and pointed out that it was necessary to remember that the hearing of the King's Proctor's plea is not an appeal from the original hearing, nor a rehearing, nor a new trial of the case. In that case, however, the fresh evidence which it was sought to adduce raised matter which was both outside the issues raised on the King's Proctor's plea and outside the scope of the original petition. In the instant case, on the other hand, the fresh evidence that was offered was both relevant to the issues raised on the King's Proctor's plea and within the scope of the original petition, being in fact an amplification of the evidence already adduced. Langton, J., accordingly ruled that fresh evidence to counter the plea of the King's

Proctor should be admitted " so long as that evidence could properly be offered upon the facts raised in the petition ".

Costs of unsuccessful intervention of King's Proctor.

The second question turned on the Judge's order as to the costs of an unsuccessful intervention by the King's Proctor. In his Lordship's view there was more hardship in putting the whole expense of the intervention on the petitioner than on the King's Proctor. He therefore made an order directing the King's Proctor to pay three quarters of the petitioner's costs of the intervention. The King's Proctor objected to this order on the ground that he had intervened in the first instance at the suggestion and instigation of the Judge. The Judge's order as to costs was subsequently upheld by the Court of Appeal: *S. C.*, [1939] P. 1. The Court had not ordered—nor had it any jurisdiction to order—the King's Proctor to put in the plea. The putting in of the plea was the action of the King's Proctor and the Attorney-General, taken at the discretion of the Attorney-General under section 183 (2) of the Judicature Act, 1925. The trial Judge, therefore, had a discretion as to costs, which had been properly exercised in this case.

Review of maintenance : effect of wife's re-marriage.

In *Perkins* v. *Perkins*, [1938] P. 210, a husband petitioned for reduction of maintenance payable to his former wife. The substantial ground of his petition was that since the decree absolute the wife had married again and her financial position had thereby substantially improved. It was claimed, on the authority of such cases as *Turk* v. *Turk*, [1931] P. 116, and *Hall* v. *Hall*, [1915] P. 105, that an order may be reviewed on the grounds that the wife's means have increased. The question of the effect of the remarriage upon the amount of maintenance was not, however; free from difficulty. There are a number of cases which consider the question whether the order for maintenance should continue only *dum sola vixerit*. No clear rule emerges from the cases and it appears from *Wood* v. *Wood*, [1891] P. 272, that the Court will consider all the circumstances of the case particularly the misconduct of the husband, the means of the wife and the amount of maintenance. Bucknill, J., applied these tests to this petition for variation and came to the conclusion that the husband must continue to make provision for his former wife. Nevertheless, the Court must take the remarriage into account in considering whether or not the fortune of the wife had increased. By her remarriage the

wife was saved the expense of maintaining a separate establishment of her own, with consequent savings on rent, food, and household expenses. The learned Judge therefore ordered a reduction from £500 to £350 per annum free of tax.

Matrimonial Causes Act, 1937, s. 11.

Teall v. *Teall*, [1938] P. 250, decides a short point on the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, as varied by the Matrimonial Causes Act, 1937, s. 11. This section adds adultery as a ground of complaint under the Acts. The time limit of six months—imposed by the Summary Jurisdiction Act, 1848, s. 11—beyond which a complaint cannot be lodged in a Court of summary jurisdiction, applies equally to a complaint founded on adultery. In such a case, time commences to run from the date of the commission of the adultery, and not from its discovery.

Foreign divorce: decree invalid, enforceability of order for maintenance.

It is a familiar principle that jurisdiction to decree a divorce depends upon the domicil of the parties, and in *Papadopoulos* v. *Papadopoulos*, [1930] P. 55, it was decided that a Court which has no jurisdiction to make a decree of nullity is equally incompetent to make an order for maintenance consequent thereon. In *Simons* v. *Simons*, [1938] 4 All E. R. 436, Goddard, L.J., applied the same rule to an order for maintenance consequent upon a decree of divorce made by a Massachusetts Court, which had no jurisdiction to decree divorce, the respondent not being domiciled within the jurisdiction.

Miscellaneous

Husband and wife; joint account.

The case of *Hirschhorn* v. *Evans*, [1938] 3 All E. R. 491, is shortly noted here as dealing with joint accounts of husband and wife with a bank. The Court of Appeal held (Greer, L.J., dissenting) that, even though a husband and wife have instructed the bank to honour cheques signed by either of them, the account is a joint one and cannot be attached by a garnishee order in respect of a debt owed by one of the joint owners (cf. *Harrods, Ltd.* v. *Tester*, [1937] 2 All E. R. 236; *Annual Survey*, 1937, p. 96).

Legitimacy Act, 1926, s. 1: presumption of legitimacy.

Maturin v. *Att.-Gen.*, [1938] W. N. 185; 2 All E. R. 214, is interesting as being, in the words of the Attorney-General, "the first case of which we have known in which the person asking to be legitimated is presumptively legitimate". Mrs. S. on March 14, 1929, presented a petition for divorce. In April and May 1929 she was living apart from

her husband and was constantly seeing a man named M. A decree *nisi* on the divorce petition was granted in June 1929 and was made absolute on January 13, 1930. On January 23, 1930, Mrs. S. gave birth to a child—the petitioner in this case. Mrs. S. and M. were married on March 20, 1930. This was a petition under Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, by the child petitioner for a declaration of legitimacy by reason of legitimation *per subsequens matrimonium*. The difficulty was that since the child had been born within nine months of the dissolution of the first marriage it was *prima facie* legitimate, and this presumption can only be displaced by the most cogent and weighty evidence. Two matters were relied upon as evidence of non-access; first, that at the date when the child was conceived Mr. S. was living apart from his wife, and second, that, at that date, Mrs. S.'s petition for divorce had already been presented. Hodson, J., held that this evidence was sufficient to rebut the presumption of legitimacy and made a declaration as prayed. Some reliance seems, from the report, to have been placed upon the evidence given at the hearing of the divorce petition, though it is very questionable whether that testimony was admissible in the legitimacy proceedings.

Presumption of legitimacy; effect of maintenance order.

It is well established that a decree of separation or even a deed of separation which is shown to have been acted upon by the parties is sufficient to rebut the presumption of access and of the legitimacy of a child born during the marriage. A mere order for maintenance which does not also provide for non-cohabitation is not on the same footing. In such a case there is a presumption of access and legitimacy, which must be rebutted by evidence: *Bowen* v. *Norman*, [1938] 1 K. B. 689.

Mental Deficiency Act, 1913, s. 11: validity of continuance order.

In *R.* v. *Board of Control, Ex p. Winterflood*, [1938] 1 K. B. 420, the Court of Appeal unanimously reversed the decision of a Divisional Court (*R.* v. *Mordey*, 54 T. L. R. 73; noted *Annual Survey*, 1937, p. 98, *q.v.*) upholding a continuance order made under the Mental Deficiency Act, 1913, s. 11. It was contended by the Board of Control that, on the true construction of section 11, a continuance order may be made within a reasonable period after the expiry of the original order and need not be made before or *eo instanti* that the order expires. It was urged that such an interpretation makes for the more convenient operation of the Act by the

Board of Control and at the same time is fairer to the patient (see *Annual Survey*, 1937, *ubi sup.*). The Court of Appeal refused to derogate in any way from the *litera legis* rule of construction in the absence of any ambiguity. "Where the language is explicit, its consequences are not for the Courts to construe. In such a case the suffering citizen must appeal for relief to the lawgiver, and not the lawyer" (*per* Slesser, L.J.). A more weighty justification for the decision may be gathered from the judgment of Goddard, L.J.: "The Courts have always been jealous, and have always taken a strong view, with regard to these matters where people are held in confinement against their will, and, unless legal authority is shown, the Court has always ordered the discharge of the person so held." The jealousy of the Courts will not in such cases be appeased by argument *ab inconvenienti*.

LITERATURE

New Books

The Law relating to Unincorporated Associations. By Dennis Lloyd, B.A., LL.B. 1938. Sweet & Maxwell. xvi and 248 pp. 21s.

This Yorke Prize Essay fills a surprising gap in the literature of English law. When one considers what an important role is played in social and industrial life by unincorporated associations it is extraordinary that this book should represent the first attempt to state as a coherent whole the general principles of law applicable to such associations. Unfortunately it is not possible to regard it as an entirely satisfactory attempt. Mr. Lloyd, it is true, handles his necessarily intractable material with great skill and sureness of touch. Nevertheless, the reviewer feels regrets that the author did not stay his hand for a while and do justice to the breadth of his researches by a more spacious treatise. Perhaps that is still to come. Representative actions are accorded very slight mention; the important role of the trust concept in the Anglo-American legal system is not adequately probed; and finally, though partnership may well be excluded for the purposes of an essay, it must necessarily take a prominent place in any historical account of the subject. The

chapters on Conflict of Laws and on Associations in French and German Law are particularly welcome, although it is a little surprising that the author resisted the temptation to study American law and literature.

In an introductory chapter the learned author discusses the nature of legal personality. He examines the Realist and Fiction theories and comes to the conclusion that "the treatment of the problems raised by questions of legal personality will be most facilitated by recognising the existence of varying degrees of personality, rather than accepting any theory of the nature of legal personality". That may be a valuable concept in itself but it seems to beg the ultimate juridical question.

There is one last matter for regret—the price of the book. It is a slim volume, and a guinea not only excludes the average student who might learn much from it but is also calculated to deter other buyers.

Probate and Divorce Handbook. By D. Perronet Rees. 1938. Butterworth. xxxii and 368 pp. 15s.

This is a very convenient reference book for the practitioner. It is well planned for easy reference and incorporates a large number of useful forms. The publishers are to be congratulated on the attractive format of the book. Thin paper editions are both pleasant to handle and economical of space.

New Editions

The Matrimonial Causes Act and Rules, 1937, rendered obsolete all the current text-books on the law and practice of divorce. The work of revision is now in progress and a number of new editions have already made their appearance. Among them are:

Practice of the Divorce Division. By E. A. Phillips, LL.B. Second edition. 1938. London: Solicitors' Law Stationery Society, Ltd. li and 687 pp. 37s. 6d.

The scheme of Mr. Phillips' book remains unchanged. An action is followed through all its possible ramifications up to its termination. The new Rules have somewhat simplified the procedure and the new practice is here set out with admirable clarity and precision. The statements of law are

not always satisfactory, since the learned author by imposing brevity on himself has sometimes fallen into misleading dogmatism, *e.g.*, his treatment of the jurisdiction of the Court in nullity proceedings (pp. 6 *et seq.*). The book remains, however, a valuable and reliable guide to the practice of the Court.

Gibson's Divorce Law. Revised thirteenth edition. 1938. By A. Weldon and L. C. Warmington. London: Law Notes Lending Library, Ltd. liii and 269 pp. 15s.

Gibson's Probate and Divorce is now split into two independent text-books, and the Divorce section, in view of the greater importance given to the subject in the New Syllabus for the Solicitors' Examination, is given a broader and more detailed treatment. The thirteenth edition was published in 1937 before the new Matrimonial Causes Rules had been issued, and the publishers withdrew the whole edition for revision. As now issued the book is, as might be expected, a careful and accurate statement of the amended law and practice. The difficulties of the new legislation are pointed out and the learned editors offer valuable guidance on the problems of its interpretation and application.

Matrimonial Causes. By L. Brooks, B.A. Second edition. 1938. London: Butterworth & Co. xxviii, 199 and 17 pp. 10s. 6d.

In this edition Mr. Brooks has revised his book in the light of the Matrimonial Causes Rules, 1937. These Rules are a complete new code of procedure and have necessitated changes at practically every stage. The Rules are printed in full, with annotations, in Part III of the book.

Matrimonial Causes Act, 1937; Supplement (1938). By S. Seuffert. London: Solicitors' Law Stationery Society. 1s. 6d.

Articles

In a lecture "On the Nature of Legal Persons" delivered at Oxford University and published in 54 *Law Quarterly Review* at p. 494, Professor Martin Wolff examines afresh the various theories of legal personality. It is impossible in a short note to do justice to Professor Wolff's article. It is an

outstanding contribution to the literature of the subject. He declares himself a convinced "fictionist". In his view the fiction theory does not feign too much but too little; it stops too early in equalising natural and juristic persons.

Mr. J. G. Starke contributes "A Note on Status" to the *Law Quarterly Review* (Vol. 54, p. 400). He suggests that there are two kinds of status: (*a*) personal status; or status *in abstracto*, which Dr. C. K. Allen has defined (Legal Duties, p. 42) as a condition of belonging to a particular class of persons subject to peculiar legal capacities and/or incapacities, and (*b*) positive status, status *in concreto*, comprising the particular rights and duties, capacities or incapacities, which a person has by virtue of this condition. He also emphasises that in every status there is an element of relativeness, which is the essence of the whole concept. The learned author suggests that a clear distinction between the two forms of status is helpful to a proper understanding of problems of private international law.

The social and legal consequences of the Inheritance (Family Provision) Bill (as it then was) are examined in a learned note by Mr. J. Gold, 1 *Mod. Law Rev.*, 296 *et seq.* In the same volume the Bill is compared with Continental provisions (by O. Kahn-Freund, pp. 304 *et seq.*) and with the New Zealand system (by J. L. Robson, pp. 302 *et seq.*).

The *Law Journal*, 1938, contains a number of interesting notes and short articles, including the following:—

Vol. 85: *The Bastardy Laws*, by Mr. Claud Mullins, p. 374, and a reply by Miss Colwill, p. 426; *Collusion in Divorce*, p. 304; *Divorce for Insanity* (G. F. Leslie), p. 392.

Vol. 86: *Bastardy (Blood Tests) Bill* (D. Harcourt Kitchin), p. 402; *Inheritance Act, 1938*, p. 342.

PROPERTY AND CONVEYANCING

LEGISLATION

Two statutes of outstanding importance fall to be reviewed in this Section. They are the *Coal Act*, 1938 (1 & 2 Geo. 6, c. 52), and the *Inheritance (Family Provision) Act*, 1938 (1 & 2 Geo. 6, c. 45). Both indicate how far away the Legislature has travelled from the nineteenth-century gospel of *laisser-faire*.

Coal Act.

The *Coal Act* sets up a body corporate bearing the name of the Coal Commission and charges it with the duty of exercising its functions as owner of the fee simple in coal and mines of coal and of property and rights to be acquired by it "for promoting the interests, efficiency, and better organisation of the coal-mining industry" (sections 1 and 2). The Commission is directed to acquire in accordance with the provisions of the Act the fee simple in all coals and mines of coals, together with certain other rights annexed thereto, and between January 1, 1939, and July 1, 1942 (called the vesting date), all coal and mines of coal are to be held as if the existing owners thereof had in respect of their interests therein (other than retained interests) entered into a contract on the valuation date to sell them to the Commission. On the vesting date all coal and mines of coal and rights annexed thereto as defined in the Act will vest in the Commission. Leasehold and certain other rights are not divested but are treated as retained interests. Compensation is to be paid to existing owners for the acquisition of their interests in accordance with the provisions of the Act (section 6). The right is given by section 13 to the owner of the fee simple who is carrying on the business of coal-mining immediately before the vesting date to a grant from the Commission of a coal-mining lease. Other sections contain detailed provisions effecting changes supplemental to or consequential on the process of "unification" aimed at by the Act. The administrative provisions of the statute are reviewed in the Section on Administrative Law.

Inheritance (Family Provision) Act.

The *Inheritance (Family Provision) Act* is a statute of very great interest. It introduces a novel principle into English law, for it enables the Court, on the application of

a "dependant" for whose maintenance the will of a testator does not make "reasonable provision" to direct that such provision shall be made out of the testator's net estate (section 1 (1)). It will be observed that the Act does not restrict the testator's power to dispose by will of his property but only enables the Court to exercise a very wide discretion to secure maintenance to a dependant, and to that extent override the dispositions made by the testator in his will. The statute follows rather closely similar enactments in force in New Zealand.

Applications can be made only by or on behalf of dependants, *i.e.*, a wife or husband; a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself; an infant son; or a son who is, by reason of some mental or physical disability, incapable of maintaining himself. The testator must have died on or after July 13, 1939 (when the Act will come into force: section 6 (2)), domiciled in England and leaving a will. Generally the provision for maintenance will be by way of periodical payments of income and will cease on remarriage, attaining full age, marriage or recovery, as the case may be. The maximum amount which the Court can award for maintenance is two-thirds of the annual income of the net estate if the testator leaves a spouse and dependants, and one half if he leaves a spouse only or other dependants only. Only where the value of the net estate does not exceed £2,000 can the Court make an order providing for maintenance by way of payment of capital. Certain matters are mentioned in the Act to which the Court must have regard when making Orders under it, *e.g.*, the nature of the property, other property vested in the dependant, and the testator's reasons for making the dispositions made by his will.

Other aspects of the statute are dealt with in the Sections on Family Law and Evidence and Procedure.

Leasehold Property (Repairs) Act.

The *Leasehold Property* (*Repairs*) *Act*, 1938 (1 & 2 Geo. 6, c. 34), was passed to prevent landlords from making oppressive demands on their tenants by threatening them with the legal consequences of neglecting to execute repairs. Where a lessor of a house with a rateable value of £100 or less serves on a lessee having more than five years of his lease to run a notice under the Law of Property Act, 1925, s. 146 (1), alleging a breach of the covenant to repair and requiring the lessee to remedy it, the lessee may within

twenty-eight days serve on the lessor a counter-notice claiming "the benefit of the Act" (section 1 (1)). A right to damages for any breach of such a covenant is not enforceable by action more than five years before the end of the lease unless the lessor has served on the lessee not less than a month before the commencement of the action a notice under the Law of Property Act, 1925, s. 146 (1), and where such a notice is served the lessee may within twenty-eight days serve on the lessor a counter-notice claiming "the benefit of the Act" (section 1 (1)).

Where a counter-notice claiming "the benefit of the Act" has been served, no proceedings can be taken by the lessor to enforce his right of re-entry or to recover damages for breach of covenant, otherwise than with the leave of the Court (section 1 (3)). The circumstances in which the Court should grant leave are indicated in the Act.

Rent Act.

The *Increase of Rent and Mortgage Interest (Restrictions) Act*, 1938 (1 & 2 Geo. 6, c. 26), amends and continues the Rent and Mortgage Interest Restrictions Acts, 1920—1935, in force until June 24, 1942. It gives effect to some, though not all, of the recommendations contained in the report of the Inter-Departmental Committee set up in May 1937 by the Minister of Health and presided over by Lord Ridley. Let it be said at once that of all the Rent Acts this seems to be the most difficult to comprehend!

Section 2 is designed to decontrol, as from September 1938, all dwelling-houses having a rateable value exceeding £35 in London or Scotland and £20 elsewhere. Certain transitional provisions contained in the First Schedule to the Act are to take effect in relation to dwelling-houses to which the principal Acts cease to apply by virtue of this section.

Save in certain circumstances mentioned in section 3 (2), the system of gradual decontrol upon recovery of possession by the landlord has been completely abolished. All houses with rateable values below those mentioned in section 2 are rendered incapable of being decontrolled (section 3). By section 4 the system of registration introduced by the Act of 1933 and affecting decontrolled houses in Class C as therein defined has now been extended to all decontrolled houses under the rateable values mentioned in section 2. An alteration is effected by section 5 in the method of determining the standard rent of a part of a house, which was separately let at the times there mentioned. A statutory duty is

imposed on the landlord of a controlled dwelling-house the rent of which is payable weekly to provide a rent book or other similar document. Failure to observe this duty, if accompanied by the demand or receipt of rent in respect of the premises, constitutes an offence punishable on summary conviction.

Section 7 contains a number of miscellaneous amendments and the Second Schedule a number of minor and consequential amendments. The principal changes made by section 7 are contained in sub-sections 1 and 2. In every question arising as to the application of the Acts the onus of proof is thrown on the landlord: sub-section 1, overruling *White* v. *Bembridge*, [1935] 1 K. B. 244, and *Heginbottam* v. *Watts*, [1936] 2 K. B. 6. The full rates chargeable in respect of controlled premises are to be treated as paid by the landlord for the purposes of calculating the increases permissible under the Acts: sub-section 2, confirming the decision in *Strood Estates Co., Ltd.* v. *Gregory*, [1938] A. C. 118.

Finance Act.

Parts III, IV and VI of the *Finance Act*, 1938 (1 & 2 Geo. 6, c. 46), contain elaborate and complicated provisions designed to amend the law relating to income tax and estate duty. Part III (sections 30—37) deals with the liability for income tax in respect of payments made during "the administration period" to a person who has a limited or an absolute interest in the residuary estate of a deceased person. The administration period is defined as the period commencing on the death of a deceased person and ending on the completion of the administration of his estate. Part IV (sections 38—41) contains provisions to meet the practice of avoiding income tax by certain kinds of revocable or determinable settlements. Part VI (sections 47—49) removes a doubt as to the liability for estate duty on the death of a person entitled to an interest in a residuary estate who dies before the administration of that estate is completed.

Modification of leases of bakeries.

The *Baking Industry (Hours of Work) Act*, 1938 (1 & 2 Geo. 6, c. 41), s. 11, gives power to the county court in certain cases to modify leases of bakeries so as to enable structural or other alterations to be effected by tenants contrary to the terms of their leases or agreements.

Parsonages Measure.

Reference only need be made to a measure passed by the National Assembly of the Church of England and known as the *Parsonages Measure*, 1938, for the purpose of consolidating

and amending the law relating to the sale of parsonage houses and of other property belonging to benefices.

Trade Marks Act.

The *Trade Marks Act*, 1938 (1 & 2 Geo. 6, c. 22), consolidates the provisions of the Trade Marks Acts, 1905 and 1919, and the Trade Marks (Amendment) Act, 1937, all of which Acts are repealed. The statute takes up fifty-nine pages of the Statute Book. It comprises seventy-one sections and four Schedules and it came into force (see section 71 (2)) on "the appointed day" as fixed by an Order, dated July 6, 1938, made by the Board of Trade under the Trade Marks (Amendment) Act, 1937, s. 33 (5), immediately after the coming into operation of that Act, *i.e.*, on July 27, 1938.

Hire-Purchase Act.

The *Hire-Purchase Act*, 1938 (1 & 2 Geo. 6, c. 22), is fully dealt with in the Sections on Contract and Mercantile Law.

Statutory Rules and Orders

Two sets of rules have been issued during 1938 amending in minor respects the Local Land Charges Rules, 1934. They are the *Local Land Charges* (*Amendment*) *Rules*, 1938 (S. R. & O., 1938, No. 499/L. 8), and the *Local Land Charges* (*Amendment No.* 2) *Rules*, 1938 (S. R. & O., 1938, No. 562/L. 12).

Pursuant to section 12 of the Land Registration Act, 1925, an Order in Council has been issued making the registration of title to land compulsory on sale in the County Borough of Croydon after January 1, 1939 (S. R. & O., 1938, No. 1569/L. 26).

The Minister of Health, in exercise of his powers under the Rent Restrictions Act, 1938, has issued the *Rent Restrictions Regulations*, 1938 (S. R. & O., 1938, No. 827), prescribing certain forms of notices and applications for registration under the Acts of 1933 and 1938.

The Board of Trade has, in exercise of the powers conferred upon it by the Coal (Registration of Ownership) Act, 1937, issued the *Coal* (*Registration of Ownership*) *Rules*, 1938 (S. R. & O., 1938, No. 58). They authorise persons interested to inspect and make copies of and extracts from entries in the Register, and enable the Board to consolidate or divide holdings. See also amendments of these Rules effected by S. R. & O., 1938, Nos. 698 and 1532.

The *Coal* (*Valuation Procedure*) *Rules*, 1938 (S. R. & O., 1938, No. 1592), made by the Central Valuation Board with

the approval of the Board of Trade under the Coal Act, 1938, indicate, as their name suggests, the procedure to be followed in determining valuations of holdings in coal mines.

The *Trade Marks Rules*, 1938 (S. R. & O., No. 661), repeal and replace the Rules of 1920 and 1925.

Rules have been made by Queen Anne's Bounty under section 15 of the Parsonages Measure, 1938, and approved by the Church Assembly (S. R. & O., 1938, No. 686).

CASE LAW

Vendors and Purchasers

Part Performance.

Broughton v. *Snook*, discussed in the *Annual Survey*, 1937, p. 147, is now reported at [1938] Ch. 505. It will be recalled that the case contains an admirable statement of the circumstances and manner in which the doctrine of part performance operates to avoid the requirement of written evidence for a contract for the sale of land under section 40 of the Law of Property Act, 1925.

Execution of trust for sale.

An interesting question arose for decision in *Re Buchanan-Wollaston's Conveyance*, 157 L. T. 601. Four persons, being the owners of separate properties, in 1928 purchased a plot of land near their properties and had it conveyed to themselves in fee simple as joint tenants. Shortly afterwards they entered into a deed of covenant regulating future dealing with the land and designed to preserve the land as an open space. One of the parties, having recently sold his own property in the neighbourhood, claimed that the Court should order that the trust for sale imposed in respect of the jointly-purchased land, by virtue of the Law of Property Act, 1925, s. 36, should be executed and the property sold. Farwell, J., refused the application, observing: "The relief which [the plaintiff] seeks he can obtain only in the Court of equity, and that Court will not extend relief to one who is putting forward a claim to equitable assistance merely to enable him thereby to escape from his contractual obligations. To do so would be to disregard the well-established rule of equity that he who seeks equity must do equity."

Preservation as open space.

Att.-Gen. v. *Poole Corporation*, [1938] Ch. 23, is a case of considerable interest to conveyancers. In a conveyance of land to a local authority, a covenant was entered into between the grantors and the local authority that the land

would be preserved as an open space for the use of the public. Later the covenantors, having laid out the land as a recreation ground, proposed to build on it a residence for a caretaker. The Attorney-General, at the relation of persons owning or interested in adjoining land, sought to restrain the erection of the residence. The Court of Appeal, affirming (though on grounds that were in some respects different) the decision of Farwell, J., held that, as it was not the covenantees who were suing for the breach of covenant, a third party (that is to say, the Attorney-General) could not enforce it. The Court also decided that the Open Spaces Act, 1906, s. 10, authorised the erection of such a building as the proposed caretaker's bungalow and that, therefore, there was no breach of any statutory duty in respect of which the Attorney-General could successfully sue.

Compulsory purchase: assessment of compensation.

A number of cases involving the assessment of compensation on compulsory acquisition of land were reported in 1938. The subject is one of great importance just now when so much land is being acquired compulsorily for national and local purposes.

Purchase for open space.

In *Collins* v. *Feltham U. D. C.*, 86 L. G. R. 34, the matter in issue was the principle on which an arbitrator should act in assessing compensation and awarding interest where land suitable for immediate development is reserved, under the Town Planning Act, 1932, for an open space. The owner of land certified by the Minister as suitable for immediate development had (pursuant to section 10 (6) of the Town Planning Act, 1932) required the local town planning authority to purchase it. The parties could not agree as to the price and so the matter was referred to arbitration. The owner claimed by way of compensation the market value of the land together with a sum representing the loss sustained by him in consequence of his being deprived of the profit in respect of houses which he might have erected on the land. The Divisional Court, on a reference from the arbitrator, decided that only the amount was recoverable which the land if sold in the open market by a willing seller might be expected to realise, and that interest on the compensation awarded was payable to the owner only as from the date of the award.

Award of interest.

In *All Souls' College, Oxford* v. *Middlesex County Council*, [1938] 2 All E. R. 586, a local authority had resolved to acquire certain land, and it was agreed with the owner that the purchase should be effected as if a compulsory purchase

order had been made and a notice to treat served on a particular date. The assessment of compensation was referred to the official arbitrator and the vendor claimed interest on the compensation as from the date of the notice to treat, arguing that the Arbitration Act, 1934, s. 11, applied. The Divisional Court refused to accede to this argument. It followed that the official arbitrator could award compensation only but no interest.

Claim for "injurious affection".

The question put by way of case stated to the Divisional Court in *Master and Fellows of University College, Oxford* v. *Secretary of State for Air*, [1938] 1 K. B. 648, was whether, on the compulsory acquisition of land by the Crown for the purposes of an aerodrome, the landowners were entitled to recover compensation "for injurious affection" of their adjoining land by the use to which the severed land might be put. The Court, following *Blundell* v. *The King*, [1905] 1 K. B. 516, and basing their answer on the provisions of the Defence Act, 1842, decided in favour of the claim for "injurious affection".

Acquisition of land for housing by L. C. C.

In an application, *Stocker* v. *Ministry of Health*, [1938] 1 K. B. 655, under the Housing Act, 1930, s. 11 (3), to quash a Housing Order made by the London County Council and confirmed by the Ministry of Health, it was claimed that the Order was bad in that it purported to authorise the county council to purchase compulsorily land in a metropolitan borough for the purpose of providing housing accommodation for persons of the working class outside that borough, who had been displaced as the result of clearance schemes outside the borough, or for the purpose of abating overcrowding outside the borough. du Parcq, J., held that the county council had authority to purchase the land under section 74 of the Housing Act, 1935. "In my opinion", he observed, "the Act empowers the London County Council (within the prescribed limits) to provide accommodation in any part of the administrative county of London (other than the City), without regard to the question whether the parts of the county from which the persons to be accommodated will be brought are or are not within the same borough as that in which the accommodation is provided." The learned Judge was also satisfied that another ground put forward in support of the application was without substance, namely, the ground that the purpose of the Order was to provide accommodation for which there was no present need.

Landlord and Tenant

Grant of right to advertise.

Clapman v. *Edwards*, [1938] 2 All E. R. 507, is a case of considerable interest. A sub-lease was granted of premises for ninety-nine years less one day. The premises comprised a parcel of land and the buildings thereon, together with the right to use the blank walls of adjoining premises for advertising purposes. The sub-tenant having granted to a company for one year the exclusive right to post advertisements on the blank walls, the sub-lessor sought to restrain him on the grounds (*a*) that the right was a personal licence and so not assignable, and (*b*) that it was a right in the nature of an easement "married" to the business carried on on the premises. Bennett, J., decided that what had been created was a licence and not an easement, and that there was nothing in the grant by the sub-lessor which showed an intention to restrict the user of or any dealing with the subject-matter.

Landlord's liability to indemnify tenant.

The case of *Shirvell* v. *Hackwood Estates*, [1938] 2 K. B. 577, in which is discussed the liability of a landlord to indemnify his tenant in respect of compensation paid to a workman killed on the land by the fall of a dead tree, is fully reviewed in the Section on the Law of Tort.

Covenant to repair.

Olympia (*Liverpool*), *Ltd.* v. *Moss' Empires, Ltd.*, 159 L. T. 206, is a curious case which, it is submitted, met with the right fate in the Court of Appeal. A claim was made by lessors against the assignees of a lease for the recovery of money alleged to be due under a particular covenant in a lease. The lease contained a number of repairing covenants and then a covenant expressed to be in performance of these repairing covenants to expend on repairs during each year of the demised term the sum of £500 and to pay at the end of each year the difference between the amount actually spent on repairs and the said sum of £500. For a number of years the tenants had spent less than £500 on repairs and the lessors sought to recover the differences. Hilbery, J., in the Court of first instance, and Greer, L.J., in the Court of Appeal, were for them on the ground that the action was not an action for damages for breach of covenant to repair or for a penalty but on a covenant to perform the lessees' obligations in a particular way. Slesser and MacKinnon, L.JJ., however, reversed Hilbery, J. Slesser, L.J., described the covenant to pay £500 as being "no more than a means of quantifying the obligation to repair" and as providing for the full satis-

faction of the repairing covenants "by certain payments in lieu of their actual physical performance". Having decided that the covenant in question was a covenant to repair and it being the case that no damage to the reversion had been proved, it followed that section 18 (1) of the Landlord and Tenant Act, 1927, precluded the recovery of the sums claimed.

Restrictions on trade.

Port v. *Griffith*, [1938] 1 All E. R. 295, is a case of considerable interest. A landlord demised a shop to a tenant for twenty-one years, the lease containing a covenant by the tenant to "use and occupy the . . . demised premises . . . as a shop for the retail business for the sale of wool and general trimmings and for no other purpose" unless the landlord gave his consent. Some years later the landlord let an adjoining shop to another tenant who covenanted to "use and occupy the demised premises . . . as a shop for the retail business for the sale of tailor and dressmaking trimmings . . . and for no other purpose" unless the landlord gave his consent. It was claimed on behalf of the first tenant that the landlord by granting the second lease had derogated from the grant contained in his first lease, and that there had been in the first lease an implied obligation by the lessor not to frustrate the purpose for which the premises were let. Luxmoore, J., refused to imply a restriction upon the landlord from an express restriction placed upon the tenant.

Compensation for loss of goodwill.

The only general interest that the case of *Dartford Brewery Co., Ltd.* v. *Freeman*, [1938] 4 All E. R. 78, possesses is the careful analysis contained in du Parcq, J.'s judgment of the report of a referee under the Landlord and Tenant Act, 1927, and the learned Judge's clear explanation of the effect of the decision of the House of Lords in *Charrington & Co., Ltd.* v. *Simpson*, [1935] A. C. 325. The referee's report awarding a new lease of the demised premises—a public-house—for ten years on the terms therein specified was adopted with one small variation.

Improvements.

Once more the litigation in *Lambert* v. *Woolworth & Co., Ltd.*, falls to be reviewed in this Section, and it seems that it is likely to reappear next year! The lessees were anxious to effect certain structural alterations in the demised premises, the effect of which would be to enlarge their shop by pulling down its back wall and connecting it with premises to be erected on adjoining land leased by them from another landlord. They claimed that these alterations constituted

"improvements" and that, having regard to certain conditions which they as tenants were prepared to observe, the landlord had unreasonably refused his consent to the improvements. In previous litigation (reported at [1937] Ch. 37) the majority of the Court of Appeal had expressed the view, without, however, actually deciding, that the alterations did amount to improvements. Another Division of the Court of Appeal, affirming Simonds, J., now, by a majority, held not only that the proposed alterations would in fact be improvements within the Landlord and Tenant Act, 1927, but that the landlord had unreasonably withheld his consent to the making of them: [1938] Ch. 883.

Agricultural holding: compensation.

Two points of interest were decided by the Court of Appeal in *Re Agricultural Holdings Act, 1923, Dunstan* v. *Benney*, [1938] 2 K. B. 1, when affirming the decision of the County Court Judge on a case stated by an arbitrator. The landlord of an agricultural holding in giving a notice to quit to his tenants stated that the tenants were not cultivating the holding in accordance with the rules of good husbandry. The tenants forthwith engaged a valuer to view the holding. In due course the landlord and the tenants appointed valuers to act for them and the tenants made a claim for compensation for disturbance. The arbitrator, having found that the tenants were cultivating the holding in accordance with the rules of good husbandry, that they had not incurred any expense directly attributable to their quitting the holding, but that they were liable to pay the valuers' fees, stated a case for the opinion of the Court on whether the tenants were entitled to compensation for disturbance under section 12 of the Agricultural Holdings Act, 1923. The Court of Appeal upheld the County Court Judge's decision that they were. "Expense incurred by a tenant in preparing a claim for compensation on being served by the landlord with notice to quit based on allegations put forward by the landlord, but denied by the tenant, ought in reason to be regarded as an expense caused by the notice to quit": *per* Scott, L.J., at p. 14. It was an item in the compensation made payable to the tenants, and although there was no other loss or expense attributable to the quitting of the holding, the minimum of compensation was rendered payable; that is to say, an amount equal to one year's rent of the holding.

Notice to quit.

A lease for seven years, granted in 1904, of an agricultural holding contained a clause enabling the landlord, if the

property should be required for public, building or other non-agricultural purposes, to determine the term thereby granted by a month's notice in writing. At the end of the term the tenant held over. The Wembley Corporation, having acquired the reversion, gave the tenant one month's notice with a view to recovering possession of the property for an open space. The tenant refused to give up possession and claimed to be entitled, under the Agricultural Holdings Act, 1908, s. 22, to twelve months' notice expiring with the year of tenancy. In *Wembley Corporation* v. *Sherren*, [1938] 4 All E. R. 255, it was decided that the clause in the original lease enabling a month's notice to be given applied to the annual tenancy, and that on the construction of that particular clause the landlords were enabled to give a month's notice expiring at any time.

Validity of notice to resume possession.

A contract made by a tenant of an agricultural holding, by virtue of which his right to claim compensation under the Agricultural Holdings Act, 1923, is taken away or limited, is to that extent void: Agricultural Holdings Act, 1923, s. 50. In *Re Disraeli's Agreement*, [1938] 4 All E. R. 658, there was a tenancy agreement for the letting of an agricultural holding for a term of two years and then to continue until two years' notice to quit was served expiring with a year of the tenancy. A proviso enabled the landlord "to resume possession in case required for building or otherwise of any portion of the demised premises without payment of compensation to the tenant", but with a reduction of rent. The landlord having given notice to resume possession of a part of the holding, the tenant claimed that he could not do so without a two years' notice. Crossman, J., held that the proviso as to resumption of possession envisaged a taking possession without notice and would render it impossible for the tenant to give notice before the termination of the tenancy. It would, if valid, deprive the tenant of his right to compensation. It followed that the proviso as to resumption of possession without notice was bad and that the landlord could only determine the tenancy by a two years' notice as provided by valid provisions of the tenancy agreement.

Rent restrictions "net rent"

The House of Lords has affirmed the decision of the Court of Appeal (reported in [1936] 2 K. B. 605) in *Strood Estates Co., Ltd.* v. *Gregory*, [1938] A. C. 118. The Rent Restrictions Act, 1920, s. 2 (1) (*c*) and (*d*), permits the rents of

controlled dwelling-houses to be raised in certain circumstances above the "standard rent" by amounts not exceeding certain percentages of the "net rent". The Act defines "net rent" to be the "standard rent" less "the rates chargeable on, or which but for the provisions of any Act would be chargeable on, the occupier". In the instant case the rates had been compounded for and paid by the landlord, and the question was whether the rates to be deducted from "standard rent" in order to ascertain the "net rent" were the smaller amount actually paid by the landlord or the larger amount which the occupier would have had to pay if he himself paid the rates. The House of Lords agreed with the Court of Appeal that what was to be deducted from the standard rent was that which the occupier was or would have been (but for special legislation) liable in law to pay, not what the landlord in fact did pay in place of the occupier. The decision is confirmed by the provisions of the Rent Restrictions Act, 1933.

Whether dwelling-house re-controlled.

A landlord, in 1928, obtained possession of a controlled dwelling-house which thereby became decontrolled by virtue of the provisions of the Rent Restrictions Act, 1923, s. 2 (1). The dwelling-house, which was situated in London and had a rateable value above £20, was then sub-divided into two parts, each of which was let to separate tenants. The rateable value of each sub-divided part was under £20; but they were not registered after the Rent Restrictions Act, 1933, had come into force. The tenant of one part claimed that consequently both parts were re-controlled. The Court of Appeal, in *Fox* v. *Marshall*, [1938] 4 All E. R. 774, refused to accept his contention. Slesser, L.J., explained the position in these words: "The subject-matter of section 2 (1) of the Act of 1933 [which renders the decontrolling section of the Act of 1923 inapplicable to houses in London with a rateable value under £20] is the same as the subject-matter of section 2 (1) of the Act of 1923 [which is the decontrolling section of that Act]. That is to say, the dwelling-house which was decontrolled in 1928 is only brought back in 1933 if it is a house of a rateable value not exceeding £20. . . . It is not permissible to take a part of the house and apply the Act of 1933, and exclude from the removal of control in 1928 that particular part of the house."

Whether dwelling-house controlled.

Two flats let to two different tenants were controlled dwelling-houses within the Rent Restrictions Acts. In 1935

minor alterations were effected in the flats and they were combined into one, which was then let to one of the two tenants. The question arose in *R. & P. Properties, Ltd.* v. *Baldwin*, [1938] 4 All E. R. 845, whether the premises were still controlled. The Court of Appeal (on appeal from the Shoreditch County Court) decided that a new dwelling-house had come into being in 1935 to which the Rent Restrictions Act, 1933, did not, therefore, apply.

"Possession."

The question in *Holden* v. *Howard*, [1938] 1 K. B. 442, was whether the landlord had come into possession of certain controlled premises so as to effect a decontrol of them by virtue of section 2 (1) of the Rent Restrictions Act, 1923. The controlled tenant died in 1931, whereupon the defendant in the present case first took possession of them as a trespasser and then occupied them as tenant. The landlord unsuccessfully claimed that in the circumstances he (the landlord) was in constructive possession of the premises during the period that the defendant (not plaintiff as appears in the report) was a trespasser. Greene, M.R.'s observation on this contention is unassailable: "It is quite incorrect to suggest that the possession of a trespasser is the possession of the true owner or the person entitled to possession."

Order for possession.

Boulton v. *Sutherland*, [1938] 1 All E. R. 488, is of interest only as illustrating the practical operation of section 4 of the Rent Restrictions Act, 1933. A controlled tenant had sub-let part of the premises at a rent above the apportioned rent in respect of the part sub-let. The County Court Judge, "having considered all the circumstances", made an order for possession in favour of the owner of the dwelling-house, and the Court of Appeal refused to disturb that order. Once it is proved that a tenant, when sub-letting, has overcharged, the Judge can, if he considers it reasonable, make an order for possession.

Easements

Easements.

Interesting questions affecting the nature of easements and profits were discussed in *Paine & Co., Ltd.* v. *St. Neots Gas and Coke Co.*, [1938] 4 All E. R. 592. An action was brought by the plaintiffs for damages for alleged pollution of two wells by the defendants. The plaintiffs based their claim to take water from the wells on a purported grant for eleven years at a rent, made by four commoners having rights

of pasturage over the common on which the wells were situated. Goddard, L.J. (sitting as an additional Judge), described the grant in these words: "What I think it purports to grant is a right to make and maintain a well for the purpose of gathering water, together with the right to lead that water to the plaintiffs' factory. Water cannot be the subject of a *profit à prendre*. . . . What I think this document does purport to create is an easement to make and maintain a well in which to gather water, which is to be conveyed by a pipe to the plaintiffs' hereditaments in the town . . . in my opinion a valid easement." The owner of an easement, unlike the owner of a *profit à prendre*, cannot rely on enjoyment of the right as a form of possession rendering it unnecessary for him to prove his title. When the title of the plaintiffs to the wells was considered it was found to depend on a grant by commoners who had "no right in them to dig wells, much less to grant rights over them to non-commoners". It followed that the plaintiffs' action failed. Other aspects of this case are reviewed in the Section on the Law of Tort.

Mortgages

Valuation of property for mortgage purposes.

Baxter v. *F. W. Gapp & Co., Ltd.*, [1938] 4 All E. R. 457, contains a valuable statement by Goddard, L.J. (sitting as an additional Judge), of the position and duties of a valuer who is instructed to value property for the purpose of an advance by way of mortgage, and for that reason deserves to be mentioned under the heading of Mortgages. The valuer's "duty was . . . to use reasonable care in coming to the valuation which he was employed to make and he must be taken to have held himself out as possessing the experience and skill required to value the particular property. If he did not know enough about the property market, or the value of the property at the place where the property was situate, he ought to have taken steps to inform himself of the values of properties there, or of any circumstances which might affect the property": *per* Goddard, L.J., at p. 459.

Clog on the equity of redemption.

Knightsbridge Estates Trust, Ltd. v. *Byrne*, 160 L. T. 68, is for several reasons a very interesting case. The relevant facts were as follows. A company executed a mortgage of freehold properties to mortgagees to secure a loan of £310,000 and covenanted to repay the principal money with

interest at the rate of 5½ per cent. per annum by eighty half-yearly instalments of principal and interest combined. The mortgage deed contained a number of provisions, most of them usual but a few of them rather stringently limiting the rights of the mortgagor. The company sought a declaration that, notwithstanding the provision for repayment of the principal by instalments, it was entitled, on giving the usual six months' notice, to redeem the mortgage upon payment of the principal, interest and costs. Luxmoore, J., having decided ([1938] Ch. 741) that the mortgage itself gave no right to redeem on giving six months' notice to redeem and that the provision postponing the contractual right to redeem was not void as infringing the perpetuity rule, held, nevertheless, that the period during which the mortgagor was precluded from redeeming and the unusual provisions of the mortgage were so unreasonable that they constituted a clog on the equity of redemption and so the company could redeem on giving six months' notice. On appeal, the Court of Appeal affirmed Luxmoore, J.'s decision on the first two points, but reversed it on the last point on the general ground that the Court ought not to interfere without justification with the freedom of business men to enter into agreements best suited to their interests, and ought not to impose upon them a test of "reasonableness" laid down without reference to business realities. "The resulting agreement is a commercial agreement between two important corporations experienced in such matters and has none of the features of an oppressive bargain where the borrower is at the mercy of an unscrupulous lender": *per* Sir Wilfrid Greene, M.R. (who delivered the judgment of the Court). Having considered the relevant authorities the Court found that none of them precluded it from taking the view that a postponement of the contractual right to redeem is not inconsistent with the essential requirements of a mortgage transaction. Such postponement must be accompanied by some provision that is oppressive or unconscionable before the Court will interfere to reform the mortgage. Mere unreasonableness is not sufficient ground for interference.

Mortgage: joint borrowers.

Tate v. *Crewdson*, [1938] Ch. 869, though a mortgage case, is mainly interesting for collateral reasons. A bank had lent money on mortgage to two joint borrowers, one, the plaintiff, being surety for the other, the defendant, for the full amount. The borrowers covenanted to repay the money

on demand and meantime to pay interest half-yearly. Between themselves the borrowers agreed that the principal money should be deemed to have been lent to them in equal shares and that each borrower should be liable to repay his half share and pay interest on it and that neither borrower should be able to compel the other to repay his half share for ten years from the date of the agreement so long as the interest owing thereon should be paid within thirty days of its becoming due. The plaintiff, being prepared to pay his half of the loan, asked for an order that on his making such payment the defendant should repay the other moiety. The defendant had been more than thirty days in arrear with each of three half-yearly payments of interest, and on this account Morton, J., held that the period specified in the proviso had come to an end. In the next place, the bank had not demanded repayment and so the question arose whether, without such a demand, there was a present liability to repay the loan. If there was such a present liability then the decision in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, [1909] 2 Ch. 401, would govern the case, for in the latter case the Court had held that where there was a present liability on executors under their testator's guarantee, the executors were entitled to compel the principal debtor to pay what was due from him to the bank. In *Re Anderson-Berry*, [1928] Ch. 290, Sargant, L.J., who had appeared as counsel in *Ascherson's Case*, explained the significance of that case, and Morton, J., on the strength of this explanation, decided that no demand by the bank was necessary to constitute a present liability to repay the loan. Accordingly the plaintiff was held entitled to the relief he claimed.

Attornment clause.

In *Woolwich Equitable Building Society* v. *Preston*, [1938] Ch. 129, Clauson, J., gave a clear explanation of the operation and effect of the common form attornment clause and proviso to it, contained in a building society mortgage. In the first place, the learned Judge pointed out that formerly the attornment clause reserved a substantial rent which enabled the mortgagee to distrain against the mortgagor, but that since the Bills of Sale Acts the power of distress created by the clause has become valueless and so only a nominal rent is reserved. Secondly, he explained that although the proviso to the attornment clause only refers to the mortgagee's right, without previous notice to quit, to determine

the tenancy by exercising the power of re-entry, this does not prevent the issue of proceedings claiming possession as having a similar effect, thus enabling the mortgagee to obtain an order for possession.

Foreclosure: necessary parties.

In a foreclosure action against a company to enforce a mortgage Simonds, J., refused to make an order for foreclosure in the absence, as parties to the action, of all the holders of debentures issued by the company and ranking after the mortgage: *Westminster Bank, Ltd.* v. *Residential Properties Improvement Co.*, [1938] Ch. 639. No provision has been made by statute or by rule for the case of an action by a mortgagee where there are numerous subsequent incumbrances: *ibid.*, at p. 644. The result may be highly inconvenient to a mortgagee of the property of a company, but the Court has never looked with much favour on the mortgagee's remedy by foreclosure. So in the absence of a provision by statute or by rule the Court does feel disposed to assist the mortgagee out of his position of embarrassment.

Appointment of receiver.

The Court of Appeal in *Refuge Assurance Co., Ltd.* v. *Pearlberg*, [1938] Ch. 687, affirmed the decision of Simonds, J., that the statutory power to appoint a receiver is exercisable by a mortgagee who has gone into possession of the mortgaged premises. In such circumstances the mortgagee must be treated as having gone out of possession when afterwards he makes the appointment of the receiver. The case indicates that a mortgagee in possession can more easily than it was generally appreciated rid himself of his liability to account on the footing of wilful default.

Restrictive Covenants

Restrictive covenants.

Further light was thrown on the nature of the interest described as a restrictive covenant in *Re Rutherford's Conveyance*, [1938] Ch. 396. Proceedings had been taken under the Law of Property Act, 1925, s. 84, for a declaration that certain land was not subject to restrictions. A conveyance had been made of the land claimed to be burdened by the restrictions to the present owner's predecessor in title subject to certain restrictions, but such predecessor had not covenanted to observe these restrictions or even executed the conveyance. It was contended that from the words of the habendum there should be implied a contractual or equitable obligation on the part of the grantee. Simonds, J.'s

observation on this contention is as follows: "It may well be that as between grantor and grantee in such a case the latter is bound in equity to observe the restrictions subject to which the former has granted the property to him. But it by no means follows that this equity can be stated in terms of contractual obligation so as to enable the grantor to assign the benefit of it to a successor in title. It is, in my judgment, at the most an equitable burden which cannot be forced into the legal category of covenant, just as the burden of a negative covenant . . . is an equitable burden which may be considered as arising from an extension in equity of the doctrine in *Spencer's Case* or of the doctrine of negative easements, but does not as between the covenantee and a purchaser of the covenantor's estate rest on a contractual basis." In any case it was not established that the benefit of the restrictions had been attached to any defined land. Further, when the supposed benefit of the restrictions was assigned the assignor had parted with all the land for the benefit of which the restrictions might have been originally imposed. In the circumstances the declaration was made that the land was not subject to the restrictions.

"Reciprocity of obligations."

Two cases which were reviewed in the *Annual Survey*, 1937, at pp. 116—117, have now been reported in the Law Reports. The first is *White* v. *Bijou Mansions, Ltd.*, [1938] Ch. 351, in which the Court of Appeal affirmed Simonds, J., on the points appealed against. The only matter of additional interest brought out in the full report is a general discussion by Greene, M.R., of the circumstances in which it is possible and proper to infer, from the facts of the case, an agreement by which purchasers from a common vendor agree to be bound *inter se*. Only one circumstance is, however, fully considered, namely, the presence of common regulations intended to apply to the whole of the estate in development. "The material thing . . . is that every purchaser, in order that this principle can apply, must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless you have that, it is quite impossible . . . to draw the necessary inference, whether you refer to it as an agreement or as a community of interest importing reciprocity of obligation." In the instant case this primary circumstance was missing and so there could be no question

of a "community of interest importing reciprocity of obligation".

Benefit attached to land.

The second case is *Zetland* v. *Driver*, which is now reported at [1939] Ch. 1. In this case the Court of Appeal reversed Bennett, J., on the ground that the restrictive covenant was, in effect, expressed to be for the benefit of the whole or any part or parts of the unsold settled property and not merely for the benefit of the settled estate as a whole, as in *Re Ballard's Conveyance*, [1937] Ch. 473. The general effect of the decision in *Zetland* v. *Driver* is to damp the ardour of the protagonists of the decision in *Re Ballard's Conveyance*, which in future will tend to be treated as "a special case" decided "on its own facts".

The law's delays.

An eloquent commentary on our system of reporting and the delay in hearing appeals is contained in the history of *Zetland* v. *Driver*. The case was first heard before Bennett, J., in March 1937 and was not finally disposed of by the learned Judge until July 29, 1937. It was then reported in the Law Reports in November. The appeal was heard in February 1938 and judgment given in March, but the report did not appear until January 1939. Leave to appeal was given, but the case does not as yet seem to have gone to the House of Lords.

Restrictive covenant on compulsory purchase.

A conveyance to a railway company of land compulsorily acquired contained a covenant by the company that no locomotive works or sheds, or any buildings for the purpose of manufacture or business other than certain things mentioned, should be erected on any land acquired from the vendor without the consent of the vendor, his heirs or assigns. The company desired to sell part of the land affected for the erection thereon of a public-house, and the Liverpool Corporation, as owner of adjacent land acquired from the vendor, claimed to be able to enforce the restrictive covenant. Simonds, J., in *Re Heywood's Conveyance*, [1938] 2 All E. R. 230, decided against the Liverpool Corporation on two grounds, namely, (i) that the covenant was not imposed for the benefit of defined land and was not one which ran with the land so as to enure for the benefit of the corporation as purchasers; and (ii) that there was no enforceable covenant in any event, for under the principle in *Ayr Harbour Trustees* v. *Oswald* (1883), 8 App. Cas. 623, an authority which has statutory power to take land compulsorily for certain purposes

cannot bind itself or its successors not to use that land for all or any of such purposes.

Settlements and Trusts

Trust or contract for benefit of third party.

The decision in *Re Sinclair's Life Policy*, [1988] Ch. 799, affords a good illustration of the problems that are met in attempts to enforce trusts or contracts for the benefit of third parties. On the death of a godfather who had taken out an endowment policy in his own name for the benefit of his godson, the godson claimed to be entitled to the policy moneys. The claim was put in two ways. In the first place, it was claimed that a trust had been declared in favour of the godson. Alternatively it was argued there was a contract with the insurance company for the benefit of the godson, who was entitled to enforce it under the Law of Property Act, 1925, ss. 56 and 205 (1) (xx) (not section 204, as is incorrectly reported). Both contentions were rejected, the first on the ground that although there was an intention to benefit the godson there was no intention to create a binding trust for him, and the second on the ground that section 56 had not the far-reaching effect of enabling the godson to claim a beneficial title in the policy moneys if he had no such title apart from the section. This decision follows all the other recent decisions on section 56 and establishes that the section has no substantive effect but was intended to meet and is still treated as applicable to a purely procedural difficulty.

Right of tenant for life to cut trees.

An interesting question on the right of a tenant for life to cut and sell trees was decided by Simonds, J., in *Re Harker's Will Trusts*, [1938] Ch. 328. The tenant for life had been let into possession of the land and had sold the trees, the proceeds having been paid to the trustees of the settlement. The trees in question were larches ripe for felling, but were not timber under the general law or by local custom. Simonds, J., held that the tenant for life was in the circumstances entitled to receive the whole of the proceeds and was not bound by any obligation to replant the land. "There is neither at common law nor in equity any rule which prevents a tenant for life from cutting in due course wood which is not timber (other than trees planted for ornament or shelter of the mansion-house or park) and retaining the whole of the proceeds. The analogy to the

case of an open mine, which the tenant for life is entitled to work and to receive the whole proceeds of working is . . . a good one": *ibid.*, at pp. 828–9.

Improvements to settled land.

The Settled Land Act, 1925, Third Schedule, Part II, contains a list of improvements the costs of which the trustees of the settlement or the Court may require to be replaced by instalments. In this list there is included " (v) structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let". In *Re Insole's Settled Estate*, [1938] Ch. 812, the Court of Appeal, reversing Simonds, J., held that a new block of buildings consisting of a garage, chauffeur's flat, workshop, engine-room, battery-room, tool shed, boiler-house, potting shed and greenhouses and erected at a short distance in rear of the principal house on the estate were " structural additions to buildings " within the meaning of the above statutory provision. The Master of the Rolls refused to accept the narrow physical test, namely, whether the additions were a substantial part of the structure of the house, applied by Simonds, J., and laid down a more liberal and acceptable test, namely, whether the group of buildings, when completed, not only formed a beneficial addition to the dwelling-house but also constituted with it one whole or unit.

Contingent interest: perpetuity.

Re Legh's Settlement Trusts, [1938] Ch. 39, illustrates the application of the perpetuity rule to special powers of appointment. The appointment was made of the income of a trust fund in favour of two grandchildren of the appointor during their joint lives as tenants in common and after the death of either of them to pay the whole of the income thereof to the survivor during the residue of his or her life, with dispositions over of the capital after the death of the survivor. Neither grandchild was a life in being when the special power was created. The life interest limited to the surviving grandchild was clearly a contingent interest, the contingency being the survivorship. This contingency might not happen within the perpetuity period. Hence the limitation to the survivor was void.

Recoupment by tenant for life.

In *Re Warwick's Settlement Trusts*, [1938] Ch. 530, the Court of Appeal affirmed the decision of Farwell, J., but the reasonings behind the decisions by no means agree. Farwell, J., thought that a tenant for life of mortgaged property is not, at least during his life, entitled to recoup

out of the *corpus* interest paid by him on the mortgage. Clauson, L.J., in the Court of Appeal, was obviously inclined to the same view, but Greene, M.R., thought that the position of a tenant for life who pays the interest on a mortgage out of his own pocket is not different from that of a tenant for life who pays the principal out of his own money. "If the tenant for life pays the amount of the deficiency out of his own money, why should his right to enjoy the benefit of the charge be postponed on the chance that, in some future years, there may be a surplus income for which he will be liable to account?" All members of the Court of Appeal, however, agreed that on the facts of the case the intention to keep alive any charge on the *corpus* in respect of the interest paid was absent. Accordingly Farwell, J.'s decision was affirmed.

Maintenance out of income of contingent interest.

The Trustee Act, 1925, s. 31, contains a power for trustees, subject to any contrary intention shown in their trust instrument, to maintain infant beneficiaries out of the income of their trust fund. The power only extends to contingent interests if the gift carries intermediate income. In *Re Reade-Revell*, [1930] 1 Ch. 52, Clauson, J., held that a specific direction to accumulate income during the infancy of a beneficiary rendered such income inapplicable for maintenance during such infancy. In *Re Leng*, [1938] Ch. 821, however, Simonds, J., distinguishing *Re Reade-Revell, supra*, held that trustees had the statutory power of maintenance where the limitation was of a residuary estate for the testator's children who attained the age of twenty-one in equal shares and the trustees were directed to retain the shares and between the ages of twenty-one and twenty-five pay the income to the children or apply the same for their benefit and accumulate the balance and after the children had attained twenty-five to pay the accumulations and the income to them during their lives with remainders over. It will be observed that in the instant case there was no express direction to accumulate the income of the beneficiaries during their infancy and so no contrary intention.

Fraud on a power.

"The question of a fraud on a power of appointment where there is one object and one object only of the power differs widely from the question of a fraud on a power by which the fund can be given to one or more of several objects. Where there is one object only of the power it is impossible to establish a fraud unless there is evidence of some arrange-

ment or bargain between the appointor and the appointee, not necessarily a legal bargain, but some arrangement under which the appointee is to give effect to the purpose of the appointor to benefit some one other than himself": *per* Farwell, J., in *Re Nicholson's Settlement*, [1938] Ch. 808. The appointor, in that case, had a power to appoint the income of a fund to any husband who survived her during his life. She had been anxious to benefit friends with whom she was living but the persons entitled in default of appointment by her would not consent to her benefiting the friends. So when over eighty years of age she married one Q. but never lived with him and later she appointed a life interest in the fund to him. There being no evidence of any arrangement with him to benefit the appointor's friends, the appointment was valid. The Court of Appeal have affirmed Farwell, J.: see [1939] Ch. 11.

Proviso on exercise of special power.

Re Neave, [1938] Ch. 798, is a peculiar case on the construction and validity of a proviso affecting an appointment in exercise of a special power. The donee of the power exercised it by will in favour of his two sons. He then added a proviso designed to make the appointees "under the equitable doctrine of election" settle their appointed shares to the satisfaction of the testator's trustees, to whom he gave an "absolute discretion" to "decide any question as to the amount and manner in which in case of default" compensation was to be made. Farwell, J., held the proviso to be bad. It is not quite clear on what specific ground, unless it be that the discretion given to the testator's trustees as to the disposition of the residuary estate in case of default was too wide. The learned Judge made it quite clear, however, that though a person exercising a special power of appointment cannot validly impose on the appointees a condition affecting their enjoyment of the appointed property, he can validly direct that if the appointees do not settle the appointed property they shall forfeit what they would otherwise have taken out of the appointor's property.

Restraint on anticipation.

In *Re Meredith's Trusts*, [1938] Ch. 806, an order for the payment of the costs of an action by a married woman, "such costs . . . not to be payable out of any property of hers to the enjoyment of which there is attached any enforceable restraint against anticipation", was interpreted as being enforceable against property which the married woman was restrained from anticipating when the order was made, but

in respect of which the restraint had (in consequence of the death of the husband) ceased to be operative when the order was sought to be enforced.

Protected life interest: impounding beneficiary's interest.

Re Balfour's Settlement, [1938] Ch. 928, was concerned with the competition between the trustee of a settlement and the trustee in bankruptcy for certain moneys in the hands of the former. A settlor on his marriage had settled a fund upon himself until his bankruptcy. The trustee of the settlement had, at the request of the protected life tenant, made to him certain advances out of capital in breach of trust. The trustee of the settlement died having appointed a bank executor, who claimed to retain income of the trust fund in its hands for making good the breach of trust. Shortly afterwards the life tenant filed his petition in bankruptcy and was adjudicated bankrupt. The trustee in bankruptcy claimed the sum retained by the bank as property belonging to the bankrupt at the date of the bankruptcy. Farwell, J., upheld the bank's retainer on the ground that when the bank asserted its right to retain the income the discretionary trust had not then become operative. By impounding the life tenant's income, the bank acted within its legal rights and caused a forfeiture of the life interest. When later the bankruptcy occurred, nothing passed to the trustee in bankruptcy. The case is distinguishable from *Re Brewer's Settlement*, [1896] 2 Ch. 503, where, prior to the date of the bankruptcy, there was no assertion by the trustees of the settlement of the right to impound the income. The following observations by Farwell, J., in *Re Balfour's Settlement* (at p. 933) are worthy of special note: "The right of a trustee to impound is not . . . anything more than an inchoate right. He is not bound to assert it. If he chooses to replace the trust fund out of his own pocket, he is not bound to call upon the tenant for life to replace it, but if he does assert his equity and retains the income in his hands, doing so under his right to recoupment, then as from that moment . . . the future income of the trust fund which would otherwise have been payable to the tenant for life ceases to be payable to him, and so from that moment his life interest is forfeited."

Succession duty: joint predecessors.

The facts in *Re Drake's Settlement Trusts*, [1938] Ch. 133, are complicated, but the legal principle involved may be stated shortly. On the facts and having regard to the instruments affecting certain settled property the Court of

Appeal concluded that two persons, being together entitled to an absolute interest in the property, had joined together in settling it on certain trusts. The legal question was who was to be considered as the "predecessor" so as to determine the rate of succession duty payable. The time at which the identity of the predecessor was to be established was the date of the settlement and at that time the succession was derived from the two settlors. Accordingly section 13 of the Succession Duty Act—the section applicable to a disposition made by more than one predecessor—was applicable in the instant case.

Administration and Wills

A greater number than usual of cases involving the consideration of rules of administration and construction seem to have come before the Courts during 1938.

Revival of revoked will.

Goldie v. *Adam*, [1938] P. 85, is an interesting case on the revival of revoked wills. A testator made a will in 1929 and made three codicils to it in 1930 and 1931. In 1932 he made a new will revoking all former wills and codicils. In 1933 he purported to make a fourth codicil to his last will dated in 1929, and in all other respects confirmed his said will. The question was whether the so-called fourth codicil operated to revive the revoked will of 1929. Bucknill, J., held that evidence of surrounding circumstances revealed a latent ambiguity in the words "the last will". This rendered admissible "evidence of the real meaning and intention of the testator" in making the codicil. On the facts proved by such evidence the learned Judge decided that the testator did not intend to revive the 1929 will and codicils, nor did the words used in the codicil of 1933 show an intention to revive them.

General testamentary power.

In *Re Lawry*, [1938] Ch. 818, the effect was considered of a gift by a testator of his residue equally between his two sisters for their respective lives with full power to deal therewith as if it were their own and with a gift over as therein mentioned. One sister predeceased the testator by a month and the other survived him by eight days. It was held that the sister who survived took a life interest in one moiety of the residue with a general power of appointment over it. This power could be exercised *inter vivos* or by will and in fact was exercised by the surviving sister's will.

Family inheritance.

Having regard to the passing of the Family Inheritance Act, 1938, the opinion of the Judicial Committee of the Privy Council on the provisions of the corresponding New South Wales Act is of considerable topical interest: see *Bosch* v. *Perpetual Trustee Co.*, [1938] A. C. 463. The question in issue turned on the meaning of "adequate provision" for "proper maintenance, education, or advancement in life . . . taking into consideration all the circumstances of the case". Lord Romer, in giving the opinion of the Board in favour of increasing the testamentary provision made for the children, discussed fully the matters to which the Court could properly have regard when exercising its discretion.

Interest on legacies.

Where a testator directs that certain legacies shall abate in priority to other legacies and the estate is insufficient to pay all legacies in full, then, if owing to difficulties of administration it is not possible to pay the legacies until after the end of the executor's year, there will be no abatement of interest in priority on the legacies directed to abate first. The interest payable on a legacy is not a bounty of the testator in the form of an addition to the legacy but is a sum which justice requires shall be paid in the course of administration: *Re Wyles*, [1938] Ch. 313.

Beneficiaries' interest in residue.

Corbett v. *I. R. C.*, [1938] 1 K. B. 567, is an income tax case, but it is of general interest in that it illustrates the application of the principle laid down by the House of Lords in *Barnardo's Homes* v. *Special Commissioners of Income Tax*, [1921] 2 A. C. 1, that until the residue of the estate of a deceased person has in due course been ascertained the beneficiaries have no interest in any of the testator's property and any income in fact received by them does not accrue to them from the estate of the testator within the meaning of the Income Tax Acts. The Finance Act, 1938, ss. 30—37, contains elaborate provisions affecting the incidence of income tax on estates of deceased persons; but it does not appear to affect the nature of the beneficiaries' interest in the residue.

Meaning of "possessions": "relations".

A testatrix died in 1930 having made her will whereby she expressed a wish that E. and H. should "take possession of" all her "possessions" to be held in trust and divided equally amongst all her "relations". In *Re Bridgen*, [1938] Ch. 205, Clauson, J. (as he then was) was asked to determine the effect of the will. It was held, first, that the whole of the testatrix's property was disposed of and that there was no intestacy; and, secondly, that the estate should be divided

in equal shares *per capita* among the persons who would have been entitled under the Administration of Estates Act, 1925, if she had died intestate. "Relations" in such a gift made before 1926 meant the persons, other than a husband or wife, who would have been entitled to the personal estate of the deceased by virtue of the Statute of Distributions, had there been an intestacy. Clauson, J., considered that after 1925 the right thing to do was to apply the same principle as before and seek the persons who would take under the Administration of Estates Act, 1925, and added: "The change in the law, while it has the effect of substituting a new class in certain respects, ought not, in my view, to be taken as altering that rule beyond strict necessity."

Construction of gift of business.

A testator, by his will made in December 1934, gave his business of a solicitor and the office furniture, law books, and other articles in the office to his managing clerk. In April 1935 the testator admitted the legatee to partnership in his business and gave him one-half of the profits. On the testator's death in 1937 two questions were raised on a summons in *Re Rhagg*, [1938] Ch. 828, namely (1) whether the legacy was adeemed by the partnership agreement, and (2) if there was no ademption, what was included in it. It was in effect conceded for the residuary legatees that the altered circumstances did not cause an ademption of the bequest, and Simonds, J., after considering the relevant authorities, concluded that the bequest comprised the testator's share of the assets in the business carried on by him in partnership, that is to say, "all the rights of which under the partnership agreement or under the general law relating to partnership the testator is able to dispose".

Gift to compound class.

There is a well-established rule of construction that where there is a testamentary gift to a compound class consisting of children and other issue, there must be double words of severance if the tenancy in common is to be imported, not only into the gift to the children, but also into the gift to children of children. In *Re Froy*, [1938] Ch. 566, it was held that the general rule is not applicable "where you have a gift in shorthand", that is to say, where the gift is in a condensed form; in that case, words of severance or division, though they occur only once, can be readily construed as applying to issue as well as to children.

Lapse.

In *Re Harward*, [1938] Ch. 632, it was held that a legacy of £5,000 bequeathed by a testatrix in her will to her

daughter and later settled by the testatrix by a codicil, did not lapse on the death of the daughter after the date of the codicil and before the testatrix's death. It took effect so far as the reversionary legatees named in the codicil were concerned.

Partial intestacy: double portions.

In *Re Vaux*, [1938] Ch. 581, the rule against double portions was applied so as to cause a proportionate ademption in the shares of residue on intestacy (occurring before 1926) taken by daughters upon whom legacies had been settled by their father's will. The intestacy had occurred through the shares of residue having been settled on trusts which were void because they infringed the perpetuity rule. The rule against double portions, however, was applied so as not to increase any share of residue to which the widow became entitled by virtue of the testator's partial intestacy.

Condition subsequent void for uncertainty.

The Judicial Committee of the Privy Council, in *Sifton* v. *Sifton*, [1938] A. C. 656, advised that a condition subsequent attached for divesting a testamentary gift was void for uncertainty. The condition was attached to payments of income and was to the effect that the payments should be made only so long as the legatee should "continue to reside in Canada". The standard of certainty applied was that laid down by Lord Cranworth in *Clavering* v. *Ellison*, 7 H. L. C. 707, 725, namely, "that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine".

Perpetuity: gift in alternative events.

If the vesting of a gift is made dependent on two alternative events one of which must and the other may or may not occur within the perpetuity period, then the gift will be valid if in fact the gift does take effect on the happening of the former event, but it is invalid if it in fact takes effect on the happening of the event that is too remote. Thus in *Re Curryer's Will Trusts*, [1938] Ch. 952, a testator directed that "on the decease of my last surviving child or on the death of the last surviving widow or widower of my children as the case may be whichever shall last happen" his residuary estate should be distributed among certain issue of his then living. The contingencies on the happening of which the estate became distributable were held to constitute two alternative events. Accordingly the ultimate gift of

capital would be valid if the death of the testator's last surviving child should happen after the death of the last surviving widow or widower of a child of the testator.

Accumulations.

The House of Lords have now affirmed the decision of the Court of Appeal in *Berry* v. *Geen*, reviewed in the *Annual Survey*, 1937, p. 124; see [1938] A. C. 575. A testator had directed that the accumulation of the income of his residuary estate should continue until the death of the last survivor of a number of persons to whom the testator had bequeathed annuities. It was held as a matter of construction that the income of the residuary estate between the determination of the legal period of appropriation and the death of the last annuitant was undisposed of. Hence the rule in *Saunders* v. *Vautier*, 4 Beav. 115, was inapplicable and the Court would not at the instance of the charity entitled on the death of the last annuitant order the accumulations to cease. Such an order would constitute an unwarranted interference with the rights of the persons entitled on an intestacy. "Persons who take on an intestacy have just as much claim to be protected in an administration by the Court as persons who are legatees": *per* Lord Maugham, L.C., [1938] A. C., at p. 588.

Charge payable out of property charged.

Re Turner, [1938] Ch. 593, illustrates the operation of section 35 of the Administration of Estates Act, 1925, which provides that a beneficiary who takes property which is charged with the payment of money must take the benefit *cum onere*. A testator bequeathed shares in a private company to his wife. Under its articles of association the company had a lien upon all shares registered in the name of a member for his liabilities to the company. At his death the testator owed a sum of money to the company. This was paid off by his executors. Simonds, J., held that the widow must discharge a proportionate part of the moneys charged on the shares bequeathed to her.

Administration: incidence of bank fees.

A testator having appointed a bank to be his executor and trustee and given it power to make the usual charges directed it to set aside (*a*) a sum sufficient to produce an annuity of £100 payable to an annuitant for life and then the sum set aside was to fall into residue; (*b*) a sum sufficient to produce £100 after deduction of tax payable to an annuitant for life, and then to hold the sum set aside in trust for the annuitant's children absolutely; and (*c*) a sum sufficient to produce the clear annual sum of £100 payable

to a third annuitant for life, and after her death the sum so set aside was to fall into residue. The question in *Re Godwin*, [1938] Ch. 341, was who had to bear the income and withdrawal fees payable to the bank. In all three cases the bank was ordered to set aside such sums as after payment of the income fee would produce the sums mentioned notwithstanding that in case (*b*) the children would thereby take ultimately a bigger capital sum; but it was directed that in that case the withdrawal fee should be payable out of the fund set aside and not out of the residuary estate.

Sales cum dividend: no apportionment.

The decision in *Re Winterstoke's Will Trusts*, [1938] Ch. 158, which was discussed in the *Annual Survey*, 1937, at p. 124, involved a departure from a well-established practice and created considerable uncertainty as to the principles which should be applied in the administration of estates, when the trustees on the death of a tenant for life sell or appropriate investments cum dividend part of which accrued when the life tenant was still living. In *Re Firth*, [1938] Ch. 517, the executors of a tenant for life of settled funds claimed that an apportionment should be made, as was done in *Re Winterstoke*, *supra*, so as to give the estate of a tenant for life some share in the proceeds of sale of investments sold cum dividend. Farwell, J., however, treated *Re Winterstoke* as being "a special case", a decision on "very special circumstances". He refused to recognise it as having introduced a novel practice or changed the old practice. In the circumstances he declined to grant the executors a declaration in favour of apportionment.

Duty of personal representative to complete contracts.

Although a Privy Council case, on appeal from the Straits Settlements, *Ahmed Angullia, etc.* v. *Estate and Trust Agencies, Ltd.*, [1938] A. C. 624, is concerned with certain general principles of English law. The matter in issue was the duty of a personal representative with respect to uncompleted contracts entered into by his testator or intestate. The opinion of the Privy Council on the question is admirably expressed in the words quoted in the Section on Contract at p. 152, *infra*.

Annuities.

Most difficult problems occur on the administration of estates of deceased persons where annuities have been bequeathed and the estate, though solvent, is not sufficient to meet the legacies and annuities in full and to leave something over for the residuary legatees. Such a problem occurred in *Re Cox*, [1938] Ch. 556, where the deceased's estate was

insufficient, after payment thereout of the pecuniary legacies and duties (which had priority by virtue of the testator's directions), to provide by its income alone for the payment of the annuities in full; but it was estimated that there would be sufficient capital to purchase the annuities (valued on an actuarial basis) and leave a balance available for payment of the residuary legacies subject to abatement. Simonds, J., held that the proper course to follow in such a case, so as to ensure fairness as between the annuitants of different ages, was to value each annuity and to pay the value so ascertained to each respective annuitant.

Charity: hall for public purposes.

A testator having bequeathed his collection of arms and antiques to the corporation of S. for deposit in the hall thereinafter mentioned, gave the proceeds of his residuary estate to his trustee upon trust to purchase a suitable site and to erect thereon a hall which should be presented to the corporation for such public purposes as it might from time to time consider desirable. In *Re Spence*, [1938] Ch. 96, Luxmoore, J., held that the reference to "public purposes" in the gift of the site and hall was to be limited to public purposes or use as a public institution for the benefit of the inhabitants of the borough, and was a valid charitable trust as one of the fourth class ("other purposes beneficial to the community") mentioned in *Pemsel's Case*, [1891] A. C. 531, 583. There was not much difficulty about the gift of arms and antiques—their preservation and exhibition to the public constituted an "educational object".

One observation (at p. 101) made by the learned Judge may be liable to misconstruction. "It seems . . . that the site and public hall are to become part of the property of the corporation . . . and accordingly are to be held, like its other corporate property, for the benefit of the borough. If there was nothing else in the will it would appear that this would be a valid charitable gift." This must surely not be taken to suggest that the ordinary property of a corporation is vested in it on a charitable trust. Where property is given to a municipal corporation to hold as part of its corporate property, it is a case of a trust but not necessarily a charitable trust.

Estate duty: accumulations: aggregation.

As is now usual in death duty cases, the matters in issue in *Re Hodson's Settlement*, [1938] Ch. 916, are both difficult and extremely technical. A settlor had when settling a fund omitted, until within three years of his death, to dispose of the

surplus income of the trust fund during the rest of the life of the annuitant for whose benefit the settlement had been made. It was held that the accumulations of surplus income as a whole did not pass under the Finance Act, 1894, s. 1, but that estate duty was payable under the Finance Act, 1894, s. 2 (1) (*d*), to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased. It was further held that the property which was so deemed to pass was not aggregable (under section 4 of the Act) with the deceased's other estate, for it was not property in which the settlor ever had an interest.

Estate duty: policy of assurance.

In *The Lord Advocate* v. *Inzievar Estates*, [1988] A. C. 402, the House of Lords were asked to interpret the following provision of the Customs and Inland Revenue Act, 1889, s. 11 (1), imposing estate duty on money received under a policy of assurance effected by a person on his life; that is to say: "Where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit." In the instant case the deceased, having assured his own life and paid fourteen annual premiums, assigned the policy. He then paid four more premiums and the assignees paid seven more. It was decided (reversing the decision of the First Division of the Court of Session) that estate duty was payable on the deceased's death in respect of four elevenths of the policy moneys (not four twenty-fifths, as the respondents claimed). The position was clearly stated by Lord Macmillan to be as follows: "You are to have regard only to the period after assignation and ascertain by whom the premiums were paid between the assignation and the death of the assured. If during that period no premium was paid by the donor, the proceeds of the policy escape duty [under the particular section]; if all the premiums were paid by the donor, the whole proceeds are subjected to duty; if some of the premiums were paid by the donor, the proceeds are subjected to duty to the extent of the proportion which the number of premiums paid by the donee during that period bears to the total number of premiums paid by the donor and the donee during that period."

Estate duty on works of art.

Certain works of art and other objects of national, scientific or historic interest are, while enjoyed in kind,

exempt from death duties on the death of their owner; but if they are subsequently sold death duties become chargeable on the "proceeds of sale" in respect of the last death: Finance Act, 1930, s. 40. In *Tyser* v. *Att.-Gen.*, [1938] Ch. 426, it was claimed by the Revenue authorities that duties were payable on the sum representing the gross proceeds of sale, but this contention was rejected and it was held that the expression "proceeds of sale" in section 40 means the net proceeds of sale, that is to say, the proceeds after deducting the expenses of that sale.

Estate duty: gifts *inter vivos*.

The facts in *Re Barnes*, [1938] 2 K. B. 684, are remarkable. A person died having, within three years of his death, made gifts of property of the value of £185,000. At his death his only property was valued at £10 and he owed debts amounting to over £90,000! Estate duty was payable on the property given away by him and his executrix claimed that allowance should be made in assessing that duty for the funeral expenses and debts of the deceased although in fact these could not be paid in the circumstances. Lawrence, J., however, decided against her on the ground that the Finance Act, 1894, s. 7 (1), only contemplated allowance being made for liabilities which were met out of the available assets of the deceased.

Personal Property

Copyright: "fair dealing".

The report of *Johnstone* v. *Bernard Jones Publications, Ltd. and Beauchamp*, [1938] Ch. 599, contains a discussion by Morton, J., of the meaning of fair dealing by way of criticism or review as a defence to an action for breach of copyright. The following observations which fell from the learned Judge are of special interest: "I think, if part of a work is reproduced and criticisms are offered upon that part, it is not necessary, in order to bring the case within the [defence] that the name of the author should be referred to. . . . If part of the work is set out and is criticised, that is enough to bring the matter within the words of the section so far as the purposes of criticism are concerned."

Copyright: assignment.

The judgment which Sir Wilfrid Greene, M.R., delivered on behalf of the Court of Appeal in *Coleridge-Taylor* v. *Novello & Co.*, [1938] Ch. 850, contains a lucid exposition of the general scheme of the Copyright Act, 1911. The specific question in issue was the effect of two apparently inconsistent provisions of the Act, namely, the proviso to

section 5 (2) and proviso (*a*) to section 24 (1). The Court of Appeal interpreted the latter proviso as meaning that if before the commencement of the Act an author had assigned his pre-Act copyright in an existing work, then the post-Act copyright became vested in him at the date on which his pre-Act copyright would have terminated; and they interpreted the proviso to section 5 (2) as dealing with assignments made after the passing of the Act and designed to restrain "the improvidence of the author by placing a statutory prohibition on assignments by him extending beyond the first twenty-five years following his death".

No copyright in ideas.

Donoghue v. *Allied Newspapers, Ltd.*, [1938] Ch. 106, illustrates the principle that there is no copyright in an idea. A well-known jockey, who had communicated certain ideas and stories to a person who wrote them up with suitable embellishments for publication as articles in a Sunday newspaper, unsuccessfully claimed to be the owner of the copyright in the articles.

Copyright: conversion.

The decision of the House of Lords in the case of *Caxton Publishing Co.* v. *Sutherland Publishing Co.*, [1938] 4 All E. R. 389, is reviewed at length in the Section on the Law of Tort.

Trade mark: geographical name.

Somewhat narrow, but none the less interesting, points were discussed by the Court of Appeal in *Re Registered Trade Mark No. 530,535 of Boots Pure Drug Co., Ltd.*, [1938] Ch. 54. In 1932 the word "Livron" had been registered as a trade mark in respect of tonic medicines, it being claimed that it was an invented word made up from liver and iron. Later a French company, who manufactured drugs at a French town called Livron, claimed to have the mark expunged. On appeal this claim was unanimously upheld—the majority of the Court of Appeal deciding that the word was not an invented word but a word having a geographical signification, and as such not registrable as a trade mark. Nor was it a word distinctive of the registered proprietor's goods. The Registrar had, therefore, rightly exercised his discretion by refusing registration.

Trade mark: adapted to distinguish.

The question in issue in *A. Baily & Co.* v. *Clark Son & Morland*, [1938] A. C. 557, was whether the word "Glastonburys", which had been registered as a trade mark in respect of "slippers, slipper shoes and motor over-shoes", was in fact a word "adapted to distinguish the goods of the proprietor . . . from those of other persons". Clauson, J.,

in the Court of first instance, decided that it was not. The Court of Appeal reversed this decision; but the House of Lords agreed with Clauson, J. Though the members of the House of Lords did not all agree with Clauson, J., that the word had not by user for some years in fact become distinctive of the goods of the manufacturer, they were all agreed that distinctiveness in fact is not conclusive upon the question whether a mark is "adapted to distinguish". The words of Hamilton, L.J., in *Re R. J. Lea, Ltd.'s Application*, [1913] 1 Ch. 446, at p. 463, were quoted with approval as representing the true view; that is to say, "the mere proof or admission that a mark does in fact distinguish does not *ipso facto* compel the Judge to deem that mark to be distinctive. It must be further 'adapted to distinguish', which brings within the purview of his discretion the wider field of the interests of strangers and of the public".

Revocation of patent.

Important questions affecting the revocation of patents were discussed by Romer, L.J. (as he then was), when delivering the judgment of the Court of Appeal in *Re Johnson & Johnson (Great Britain), Ltd.'s Letters Patent*, [1938] Ch. 283. The appeal was against an order affirming the revocation by the Assistant Comptroller of a patent for improvements relating to waterproof fabrics. After a careful review of the specification the Court concluded that it contained two mutually contradictory indications and that the patentees had, therefore, failed to describe sufficiently and fairly the nature of their invention and the manner in which it was to be performed. The order to revoke the patent was accordingly affirmed. The Court then went on to condemn the practice prevailing in the Comptroller's office in case of opposition proceedings under section 11 of the Patents Act, 1907, and of proceedings under section 26 of the same Act, of taking into consideration matters (such as questions of utility, prior user and subject-matter) that can only properly be considered in proceedings to obtain the revocation of a patent by the Court under section 25. Further, it was thought "desirable . . . though . . . not strictly necessary" to point out that the Comptroller's implied powers to allow amendments of a specification in opposition proceedings under section 11 must be treated as subject to the same restrictions as those imposed by the other sections of the Act in which powers of amendment are expressly given.

LITERATURE

New Books

The Law of Mortgages. By H. G. Hanbury and C. H. M. Waldock. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. xl and 502 pp. 25s.

In the Preface the aim of this work is described as being "to supply a connecting link between, on the one hand, such monumental works as 'Coote' and 'Fisher and Lightwood' on Mortgages and, on the other, the current text-books on Real and Personal Property". The method has been "to present a full account of the law of mortgage of land and then to indicate the variations in the incidents of the transaction attendant upon a difference in the subject-matter". Accordingly, the first six chapters treat of mortgages of land, and the last three deal respectively with Mortgages of Personal Chattels; the Bills of Sale Acts; Mortgages of Choses in Action; and Mortgages of Ships.

The authors deserve to be cordially congratulated on the success of their venture. The general plan of the work is excellent and the substance is most carefully and clearly expressed. The book meets a real need. It will be of the greatest assistance to teachers of law and many practitioners have already found it very useful. The only flaws that the reviewer has discovered in it are to be found in the names and references to cases, both in the footnotes and in the table of cases. These minor errors—they are quite a number—can, however, easily be put right when a new edition is being prepared.

An Introduction to Equity. By G. W. Keeton. London: Sir Isaac Pitman & Sons, Ltd. xxx and 242 pp. 17s. 6d.

Professor Keeton has written a most readable general introduction to English Equity. He has succeeded in generalising without at the same time being superficial. There is a store of historical and comparative material at hand to support his generalisations and a wealth of case law to serve as illustrations. Beginners can without too great a strain follow what is written but many a problem is touched upon that may stimulate a more advanced student. The chapter headings will indicate the contents. They are:

What is Equity?; The Growth of the Equitable Jurisdiction of the English Courts; The Relation of Law to Equity; The Maxims of Equity; The Assignment of Choses in Action at Law and in Equity; Conversion and Reconversion; Election; Satisfaction and Performance; Ademption; Rectification of Instruments for Mistake. There is one complaint that can legitimately be made: the price (17s. 6d.) is definitely too high.

Executorships and Trusts. By J. H. Phillips and G. E. M. Jenkins. London: Sir Isaac Pitman & Sons, Ltd. xxii and 381 pp. 15s.

This is written as a text-book for students preparing for the subjects "Practical Trust Administration" and "Law relating to Wills, Executors, Administrators and Trustees" in the examination for the Diploma in Executor and Trustee Work granted by the Institute of Bankers. It seems to be well designed and executed for that purpose; for it seems to cover the syllabus set, it is written in a clear style and the treatment of the subject-matter is eminently practical. Indeed the great merit of the work is that it shows intimate knowledge of the practical operation of the rules and principles discussed. For that reason it can be confidently recommended for consultation by practitioners. The desire to cover the syllabus set for the particular examination no doubt accounts in the main for the general arrangement of the last part of the book—this is probably the least satisfactory part of it. The price of 15s. seems to be eminently reasonable for a law book of this size.

Six Vital Acts of 1938 Annotated by S. H. Noakes and L. Tillard. London: Hamish Hamilton (Law Books), Ltd. xxxviii, 260 and [23] pp. 21s.

The statutes annotated by Mr. Noakes are the Rent Restrictions Act, the Evidence Act, the Leasehold Repairs Act, the Hire-Purchase Act, and the Administration of Justice (Miscellaneous Provisions) Act. Mr. Tillard has annotated the Family Inheritance Act. The plan followed in each case is to set out shortly in an introductory note the general aim and scope of the particular Act and then to set out its provisions section by section with annotations on each section. The annotations are adequate and suggestive but

are not very full. They will be found very useful by those who may be called upon to interpret and apply these Acts—all of them important from the practitioner's standpoint and some of them breaking entirely new ground. An Appendix contains the rules so far issued under the statutes and a small but useful collection of forms and precedents.

The Law of Trade Marks. By H. Keynes Turner. London: The Solicitors' Law Stationery Society, Ltd. xxxii and 358 pp. 25s.

The author of this new work aims at setting out the law and practice consolidated in the Trade Marks Act, 1938, and the Rules made under that Act, "in a form which . . . will be useful to the practitioner and to those who are interested in the subject of Trade Marks". Pages 1—163 contain a general exposition of the law, in nine chapters. Appendices I and II contain reprints of the Trade Marks Act, 1938, and the Trade Marks Rules, 1938. A table is published in Appendix III showing sections of the Trade Marks Act, 1938, corresponding to or amending sections of the Trade Marks Acts, 1905 and 1919. The Patents and Designs Acts, 1907—1938, are set out in Appendix IV. A difficult and somewhat technical subject is expounded at moderate length with commendable clarity and a high degree of accuracy.

The Principles and Practice of Compulsory Purchase. By J. Ian Hamilton. With a Foreword by H. Heathcote-Williams. London: Sir Isaac Pitman & Sons, Ltd. xi and 88 pp. 7s. 6d.

The author of this book describes its object as being "to provide surveyors, property owners, students, and general practitioners with a short and simple work dealing with the main questions of compulsory purchase, the principles and general procedure". So far as it goes the work is good. It sets out general principles well and clearly, though it sometimes shows that the author is not fully conversant with legal phraseology. The illustrations are chosen with discrimination. As an elementary guide the work will be very useful—though the price is high for such a small book. It is a pity that it is not double its size, for then its usefulness and its appeal would be considerably more than doubled.

New Editions

Encyclopædia of the Laws of England. Third edition. Editor-in-chief: E. A. Jelf. Vol. II. xii and 789 pp. Vol. III. xi and 796 pp. London: Sweet & Maxwell, Ltd., and The Solicitors' Law Stationery Society, Ltd. Edinburgh: W. Green & Son, Ltd. £2 10s. per volume.

Two volumes of the new edition of the Encyclopædia of the Laws of England have been published during the year 1938. The first of the two volumes covers the subjects ranging from "Back-Freight" to "Charges of Registered Land". Over two hundred subjects are dealt with by forty-two different contributors. The second of the two volumes deals with one hundred and thirty subjects from "Charities" to "Coroner". The number of contributors to this volume is thirty-six. The well-known general features of the Encyclopædia are carefully preserved in these two volumes. The subjects are dealt with at moderate length having regard to their importance, there are brief historical accounts where appropriate and it is clear that great care has been taken in the preparation of the edition. The printing is extremely well done.

Real Property Law. By G. R. Y. Radcliffe. Second edition. Oxford: At the Clarendon Press. xxxii and 396 pp. 15s.

Dr. Radcliffe has taken advantage of the publication of a second edition of his work "to correct some errors, and to remove some ambiguities". In one case only, that of restrictive covenants, has he made extensive changes. The general plan remains, with its undue emphasis on and elaboration of the historical side; so much so that a beginner might well be left with the impression that the English land law is almost entirely a matter of history, that it is a system that in former times yielded "to forces, economic and political" but that no longer reacts to any such influences. The student may also be puzzled, if not confused, by the continued division of the work into two parts—the first part mainly historical but in many instances leading to a statement of the modern law, and the second part expounding the general principles of the legislation of 1925 and containing the main statements of the modern law.

PROPERTY AND CONVEYANCING

Introduction to Real Property Law. By J. A. Watson. Second edition. London: Sweet & Maxwell, Ltd.; Toronto: The Carswell Co., Ltd.; Australia: The Law Book Company of Australasia (Pty), Ltd. xvi and 328 pp. 15s.

This is an elementary book "for beginners and private students". It has been revised by the author and many of the blemishes that appeared in the first edition have now been removed.

Gibson's Conveyancing. Fifteenth edition. By Arthur Weldon, H. Gibson Rivington, and J. F. R. Burnett. London: The Law Notes Lending Library, Ltd. cvii and 766 pp. £2.

It is five years since the fourteenth edition of this work was published, and, as the editors state, no statutes have been passed in that period drastically affecting the subject-matter. The statutes which were passed have been dealt with, but it is very unfortunate that the Evidence Act, the Rent Restrictions Act, the Leasehold Repairs Act and, above all, the Family Inheritance Act, could not have been incorporated—they were, of course, passed after the edition had gone to press. The important decisions given in recent years have been incorporated, and the effect of some of them that have given difficulty (*e.g.*, *Re Duce, etc.* (1937), on p. 128) has been rather abruptly, but none the less accurately, stated. The volume covers a very wide field—some parts more thoroughly than others. It bears the marks of careful revision. It is published at a very reasonable price having regard to its size.

Rent and Mortgage Interest Restrictions. By the Editors of "Law Notes". Seventeenth edition. 1938. London: "Law Notes" Publishing Offices. xxiv and 324 pp. 10s. 6d.

The first of the Rent and Mortgage Interest (Restrictions) Acts was passed in 1915 as a temporary measure to deal with abnormal conditions. After it had been amended by several statutes the Act of 1915 and the Acts amending it were repealed and replaced by the Act of 1920, which is now the "principal Act" affecting the subject, though it has been changed, amended and added to by a large number of subsequent enactments, as many as seven of which remain in

force (wholly or in part) to-day. A study of these Rent Acts throws a good deal of light on the ways of legislators in emergencies, on the lack of a consistent policy in facing an important social and economic problem, on the deficiencies inherent in the present system of drafting parliamentary measures, and even on the changes in the judicial attitude towards the interpretation of the Acts themselves. Generally speaking, this light will only be seen by those who read between the lines of this new edition of a well-known work, but a valuable "Introductory Sketch" at its beginning serves to draw attention to it.

The principal features of the new edition are the amendments in the Introductory Sketch, the revision of the notes on the statutes mentioned in the last edition, and the addition of the text of the Act of 1988 with annotations.

A Guide to Land Registry Practice. Fourth edition. By J. J. Wontner. London: The Solicitors' Law Stationery Society, Ltd. xi and 234 pp. 10s. 6d.

This work first appeared in 1928 as a handbook designed to give to solicitors and their clerks "practical and elementary" information as to the procedure and practice at the Land Registry. With the extension of the areas for compulsory registration of title and the consequent increase in importance of Land Registry practice, this Guide has increased in bulk and has grown to be something bigger than a guide. It retains, however, its main feature of being an aid to the understanding of the practice at the Land Registry.

Hood & Challis's Property, Settled Land, Trustee and Administration Acts and other Acts affecting Conveyancing. Eighth edition. By J. H. Boraston. London: Stevens & Sons, Ltd. cxxxii and 980 pp. 80s.

The seventh edition of this work appeared in 1909, since when almost all the Acts annotated in that edition have been repealed and their place taken by the Property legislation of 1922–26. In reality, therefore, this is a new commentary upon the Law of Property and kindred Acts; though we are assured by the editor that "it has been found possible to incorporate, with such alterations as the new statutory provisions and fresh decisions have dictated, the great bulk of

the notes of the former edition". In this way it has "been sought deliberately in this edition, as in earlier editions, to preserve as much as possible of the original work of Messrs. Hood and Challis".

The whole or a part of the text of as many as twenty-two statutes has been reprinted and each section is annotated. There are two appendices, the first containing reprints of sections of six statutes affecting conveyancing, and the second appendix Land Charges and Restrictive Covenants Rules. All these, together with Tables of Cases and Statutes and an Index, are collected together into one volume and published at the remarkably low price (having regard to the contents and the excellent print) of 30s.

The annotations so far as they go are very helpful, but they are more frequently than not too brief. However, those on some sections are exceptionally full and most valuable.

Articles

Attention is drawn to the following Notes and Articles which have appeared in the *Law Quarterly Review*, Vol. 54:—

Pp. 25—28, a note by W. H. D. Winder on "Charity as a Legal Person"—a subject which is becoming more "topical" even than it was when Mr. Winder wrote his note.

Pp. 70—77, a short article by A. D. Hargreaves, under the doubly scaring title of "Shelley's Ghost", being a learned inquiry, stimulated by an observation made by Mr. Farrer, into the origin of the Rule in *Shelley's Case*.

Pp. 258—265, a short article by M. J. Albery under the title "Some Further Reflections on *Re Chardon*", in which certain wild assertions about that much debated case are countered and the general effect of the decision moderately stated.

Pp. 576—582, an article by M. M. Lewis on "Settlements of Land". Professor Lewis takes as his theme the disadvantages of certain strict requirements of the Settled Land Act, 1925, so far as small estates are concerned, and the acknowledged difficulties met in trying to distinguish between settled land and land held upon trust for sale.

The *Cambridge Law Journal*, 1938, pp. 339—366, contains the results of a learned and detailed study of a problem now frequently before the Courts, namely, who can enforce

restrictive covenants. The title of the article is "The Benefit of a Restrictive Covenant" and the writer is S. J. Bailey.

The *Conveyancer and Property Lawyer* for 1938 continues to publish articles of special interest to conveyancers. Of the articles which have a more general interest, the following may be mentioned:—

"The Right to Take Water on the Land of Another", by J. S. Fiennes, March 1938, pp. 203—207.

"Waste and the Settled Land Act", by H. Potter, March 1938, pp. 233—240.

"Remainder to 'Survivor' of Persons for Life Only: Vested or Contingent", by F. E. Farrer, June 1938, pp. 307—316.

"Restrictive Covenants affecting Freehold Land", by C. H. S. Preston and G. H. Newsom, September and December 1938, pp. 26—59, 186—164.

The *Journal of Comparative Legislation*, 1938, pp. 24—28, contains an interesting article by Sir Thomas H. Holland on "Mineral, not Mining, Laws in the British Empire".

Different aspects of the topical subject "Freedom of Testation in the Light of the Inheritance (Family Provision) Bill" are dealt with by different writers in the *Modern Law Review*, March 1938, pp. 296—307.

The *Solicitors' Journal*, the *Law Journal*, and the *Law Times* contain articles on topics of current interest.

THE LAW OF CONTRACT

1938 may be described as a quiet year in this field of law. The promise of a harvest given by the publication in 1937 of the sixth interim report of the Law Revision Committee was not fulfilled. There seems to be little prospect that the recommendations of the Committee on the subjects of the Statute of Frauds and Consideration will be implemented by legislation in the near future.

LEGISLATION

In accordance with modern trends, the year saw the enactment of a considerable number of statutes providing for the regulation of commerce and industry and modifying in varying degrees the freedom of contract. These statutes are too detailed for description here, and, in any case, fall more appropriately for discussion in other sections of the *Survey*.

1 & 2 Geo. 6, cc. 17, 30, 41, 44, 69, 70, 71.

The following may be mentioned: the *Cinematograph Films Act*, the *Sea Fish Industry Act*, the *Baking Industry (Hours of Work) Act*, the *Road Haulage Wages Act*, the *Young Persons (Employment) Act*, which amends the Shops Act, 1934, the *Holidays with Pay Act*, and the *Bacon Industry Act*. The *Leasehold Property (Repairs) Act*, 1938, is discussed in the section on the Law of Property.

1 & 2 Geo. 6, c. 34.

1 & 2 Geo. 6, c. 53.

The *Hire-Purchase Act*, 1938, discussed in the Mercantile Law section, must affect a substantial proportion of the community and may well deserve as much attention as is given in the text-books on the law of contract to the Statute of Frauds and its allied enactments. It should be observed that the Act deals with credit-sale agreements, as defined in the Act, as well as with hire-purchase agreements. The requirements of written notices and memoranda, and the somewhat complicated results of failure to comply with them, are particularly noteworthy and call for comparison with the corresponding provisions of the Statute of Frauds. The discretion given by the Act to the Courts to dispense in certain cases with some of these requirements, where it is just and equitable so to do, deserves specific notice. The subjects of void conditions, implied warranties and conditions, the right to terminate contracts, and the appropriation of payments are all affected by this Act.

CASE LAW

Contractual intention or relationship.

Jones v. *Vernon's Pools, Ltd.*, [1938] 2 All E. R. 626, may be mentioned as an example of a type of case which has not been uncommon recently and as a topical illustration of the application of the well-known principle of *Rose & Frank Co.* v. *Crompton & Brothers*, [1925] A. C. 445, that where the parties themselves expressly exclude their arrangements from the province of the law, and relegate them to the realm of honour, they cannot successfully claim contractual remedies upon them in the Courts. Because of a very comprehensive provision of this nature, the plaintiff, a discontented entrant in a football pool competition, was held to have no remedy for an alleged breach of contract. He could only trust the promoters, "and, if something goes wrong, . . . it is his funeral and not theirs" (*per* Atkinson, J.).

If two people, whether they be husband and wife or not, enter a restaurant together and order food, and the evidence is "completely neutral" as to which of them is "in charge of the proceedings", the legal inference, according to the judgment of Tucker, J., in *Lockett* v. *Charles, Ltd.*, 55 T. L. R. 22, is that each of them is making himself liable to the proprietor for the food which he orders, whatever may be the arrangement between the parties *inter se*. This inference may be disturbed by circumstances which indicate to the proprietor that one is acting as host to the other, but the mere relationship of husband and wife does not raise the presumption that the husband is acting as host to his wife. Consequently, the wife may have contractual remedies against the proprietor—or *vice versa*. An interesting point arising out of this case is the exact nature of the basis of the award of damages to the husband in respect of expenses which he incurred through his wife's illness. The reports of the case state that it was ultimately fought on the ground of contract. If, as the learned Judge held, the contract in respect of the offending fish was made with the wife, the husband must have recovered on the basis of some restitutory principles unspecified in the reports.

In this section, the interest of the judgment of Stable, J., in *Read* v. *Croydon Corporation*, 55 T. L. R, 212, lies in his Lordship's acceptance of the view that where a person is under a statutory duty to supply some service or thing, and

another is entitled to receive it, the resulting relationship is not, of necessity, a contractual one, although the rights and obligations arising out of the statutory provision may be similar to, or identical with, those arising normally out of a contract of sale or of service. The parties may consequently be without contractual remedies and may have to rely upon remedies arising out of the statutory provisions and/or those available in tort at common law. (See also p. 200.)

Implied terms.

An interesting point in the judgment of Branson, J., in *Kawasaki K. K. K. of Kobe* v. *Bantham S.S. Co., Ltd.*, [1938] 1 K. B. 805, is that the principle of *Makin* v. *Watkinson* (1870), L. R. 6 Ex. 25, that there must be implied into a contract an obligation on the one party to inform the other party of that which was within his knowledge and not within the knowledge of the other party, in order to enable the other party to discharge his obligation under the contract, is a general principle applicable to all contracts and not limited to the law of landlord and tenant. The Court of Appeal had little difficulty in supporting this view—[1938] 2 K. B. 790. As was pointed out in *Murphy* v. *Hurly*, [1922] 1 A. C. 369, where the matter does not lie more properly within the knowledge of the one party than of the other, notice is not requisite unless the contract contains an express stipulation. "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the other party, this notice ought to be given" (Lord Abinger in *Vyse* v. *Wakefield* (1840), 6 M. & W. 442, 452).

The requirement of a memorandum.

Under the Moneylenders Act, 1927, s. 6, a contract for the repayment of money lent by a moneylender is unenforceable unless a memorandum of the contract, containing all the terms of the contract, is made and is signed by the borrower.

Moneylenders' contracts.

The memorandum under discussion in *Mitchener* v. *Equitable Investment Co., Ltd.*, [1938] 2 K. B. 559, mentioned that the loan was secured by a bill of sale on the plaintiff's furniture. The Bills of Sale Acts provide that a bill of sale must be in a certain statutory form, which form provides that no powers of sale other than those specified in section 7 of the Act of 1882 may be incorporated. Lawrence, J., held

the memorandum in this case to be insufficient to satisfy section 6 of the 1927 Act because it did not specify upon which of the grounds mentioned in section 7 of the 1882 Act the goods could be seized. In *Hoare* v. *Adam Smith (London), Ltd.*, [1938] 4 All E. R. 283, du Parcq, L.J., sitting as an additional Judge, explained that the decision in *Mitchener's Case* is only applicable where the borrower has not received a copy of the bill of sale. Where he has received a copy, it is sufficient to incorporate the bill of sale in the memorandum of loan by reference. Incidentally, his Lordship also held that a borrower is not estopped from alleging that the consideration is not correctly stated in a bill of sale. Similarly, he would not be estopped, although he knew the true facts, from asserting the inaccuracy of statements in a memorandum of loan under section 6 of the 1927 Act. To hold otherwise would be to prevent the Courts from executing the intention of the Legislature as expressed in that Act.

The strictness with which the provisions of section 6 are applied is well illustrated by the decision in *Re A Debtor (No. 18 of 1937)*, [1938] Ch. 645, where two promissory notes had been taken as a security which was described in the memorandum as "a promissory note". Farwell and Morton, JJ., held that the misdescription was sufficient to make the memorandum insufficient. "It is plain that each promissory note could have been endorsed and made over for value to different persons, either or both of whom would have been in a position to sue the debtor, and the debtor's position was therefore less favourable than it would have been had the transaction been what it was stated to be in the memorandum."

In *Cohen* v. *Lester, Ltd.*, [1938] 4 All E. R. 188, the borrower had deposited jewellery as security for a loan by moneylenders. The memorandum was admitted to be insufficient. The moneylenders pleaded that the borrower could not claim the return of the jewellery without paying all the sums due under the contract on the principle that "he who comes to equity must do equity and come with clean hands". Tucker, J., rejected this plea on the ground that section 6 of the 1927 Act only renders the contract and the security *unenforceable*—not illegal. Consequently, those precedents were inapplicable which establish that in the case of a transaction void for illegality neither party can take any proceed-

ings for the restoration of property, or the repayment of money, which has been transferred or paid in the course of the illegal transaction. To allow the moneylender to keep the jewellery would in effect amount to enforcing a contract which section 6 renders unenforceable. It is of interest to contrast this decision with *Monnickendam* v. *Leanse*, 39 T. L. R. 445, and similar decisions, which allow the retention of a deposit paid under a contract which is unenforceable under the Statute of Frauds, s. 4, or the Law of Property Act, 1925, s. 40.

For an illustration of an agreement to buy certain book debts for certain payments which was held not to be a money-lending transaction, although the defendants' reason for entering into it was that they wished to raise money for a limited period, reference may be made to the judgment of Branson, J., in *Olds Discount Co.* v. *Playfair*, 159 L. T. 382.

The Law of Property Act, 1925, s. 40.

In *Smith* v. *MacGowan*, 159 L. T. 278, the defendant, through his solicitors, bought at an auction three separate lots of property from the plaintiff. The solicitors signed one memorandum whereby the defendant agreed to purchase the three lots for a stated aggregate price. Luxmoore, J., held that as the evidence showed that there had been three separate agreements and that the solicitors had no authority to combine the separate agreements into one indivisible agreement, the memorandum was insufficient to satisfy the requirements of the Law of Property Act, 1925, s. 40.

Statute of Frauds, 1677, s. 4.

Of neither of two recent decisions on the Statute of Frauds, s. 4, can it be said that it is wholly satisfactory. In *Vernon* v. *Findlay and Vaughan*, 55 T. L. R. 77, a point was raised which was not exactly covered by previous decisions. On December 1, 1936, the defendants verbally agreed to employ the plaintiff as a sales manager, as from January 1, 1937, for a company to be formed, at a fixed yearly salary plus a commission. The company was never formed, but the plaintiff served the defendants for three months and, on the termination of his services, sued them for his salary for that period and for a month's salary in lieu of notice. Lewis, J., after an exhaustive review of the judgments of the Court of Appeal in *De Stempel* v. *Dunkels*, 54 T. L. R. 289 (see the *Annual Survey*, 1937, pp. 158, 187, 192), held that the agreement, being for an indefinite period at an annual salary, must be presumed to have been one for a general hiring of

the plaintiff's services for one year and that such a contract cannot be terminated by either party before the end of the year unless there be an express stipulation or custom to the contrary—of which there was no evidence in this case. Having decided that this contract was for a year, his Lordship was faced with the problem whether, despite the fact that no definite time was mentioned in the contract, it was one not to be performed within a year of the making thereof. He held that it was within the Act and that no action could be brought upon it. The curious feature of the case is that no reference was made to the possibility of the plaintiff obtaining a *quantum meruit* for the services rendered for the three months. This point was raised in the subsequent case of *Adams* v. *Union Cinemas, Ltd.*, [1939] 1 All E. R. 169. With respect, parts of the judgment of Stable, J., as reported, are far from being illuminating, but, referring to *Vernon* v. *Findlay*, his Lordship clearly intimated that he dissented from it in so far as it decided that, where the contract is unenforceable because of the Act, the servant cannot recover anything for the services which he has given and which have been accepted. He thought that that view is "contrary to the decision in *Scarisbrook* v. *Parkinson* (1869), 20 L. T. 175, and it is contrary to the *dictum*—true, only a *dictum*—of Thesiger, L.J., in *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, and contrary to the decision of the Court of Appeal in *Craven-Ellis* v. *Canons, Ltd.*, [1936] 2 K. B. 403". The question of the award of a *quantum meruit* for services rendered under a contract unenforceable under the Statute of Frauds is discussed by Mr. A. T. Denning, K.C., in his article on "*Quantum Meruit*" in the *Law Quarterly Review*, Vol. 55, p. 63.

The remarkable decision of the Court of Appeal in *Marrison* v. *Bell*, [1939] 1 All E. R. 745, that, in the absence of a contrary stipulation, a servant is entitled to his wages, in addition to his health insurance benefits, during a period of sickness, comes too late for detailed consideration in this section. The case bears no direct relation to the Statute of Frauds, but it is worthy to be borne in mind when discussing a case like *Scott* v. *Pattinson*, [1923] 2 K. B. 723.

Re a Debtor (*No. 88 of 1938*), [1939] 1 K. B. 225, discussed in the Mercantile Law section, is worthy of reference for its discussion of the relation between an "acceptance" Sale of Goods Act, 1893, s. 4.

within the meaning of the Sale of Goods Act, s. 85, and an "acceptance" under section 4 of the same Act.

Executors.

The argument advanced by counsel for the respondents in *Ahmed Angullia* v. *Estate and Trust Agencies (1927), Ltd.*, [1938] A. C. 624, was: "It is the duty of an executor to do his best for the estate. . . . There is nothing immoral in breaking a contract, and if an executor can benefit the estate by committing an actionable wrong and paying damages therefor, so that the person wronged really suffered nothing in the end, it is his duty to do so. If in the present case the carrying out of the contract would necessarily cause much more expense to the estate than paying damages for the breach, it was the duty of the appellant to pay such damages." The Judicial Committee had no difficulty in rejecting such a strange doctrine. "*Prima facie*, it is the duty of a legal personal representative to perform all contracts of his testator or intestate, as the case may be, that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him for any reason, such as the Statute of Frauds, and is one that it would be disadvantageous to the estate to perform, it is a different matter; . . . though it seems to be settled that he is not bound to plead the Statute of Limitations, and may pay a statute-barred debt unless it has been judicially declared to be so. . . . Nor, in the case of an enforceable onerous contract, ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act, and, in their Lordships' judgment, it can never be the duty of an executor or an administrator to commit such an act" (*per* Lord Romer).

Married women.

Re A Debtor (*No. 21 of 1937*), [1938] Ch. 694, falls more appropriately for discussion in the Mercantile Law section, but it may be well to note here the decision of the Court of Appeal that by virtue of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, where a judgment has been obtained against a married woman for a debt, part of which was incurred before the passing of the Act, a bankruptcy notice issued in respect of the judgment is invalid. Failure to comply with the notice is not an act of bankruptcy and a bankruptcy petition founded upon it must fail.

In *Re Meredith's Trusts, Meredith* v. *Clarke*, [1938] Ch. 806, the appointment of a receiver by way of equitable execution was claimed in the following circumstances. An order for payment of costs was made against a married woman in November 1936, the order stating that the costs were not to be payable out of any property of hers subject to an enforceable restraint upon anticipation. Under a settlement of 1892 she was entitled to the income of a trust fund without power of anticipation. Her husband was alive in November 1936, but she was now a widow who had not remarried. Bennett, J., allowed the appointment of a receiver on the ground that the order of 1936 only prohibited the payment of costs out of property subject to an *enforceable* restraint. Since the termination of coverture the restraint was no longer enforceable. Under section 1 of the Act of 1935, a married woman is subject to the law relating to the enforcement of judgments and orders in all respects as if she were a *feme sole*. The provisions of the Act for the protection of existing restraints did not apply to a case such as this. It was the termination of the coverture, not the provisions of the Act, which rendered the restraint unenforceable. Despite this argument, it appears that the decision does mark a change in the law on the effect of a judgment against a married woman; the old order protected the income even after the husband's death.

Guarantors.

The judgment of Morton, J., in *Tate* v. *Crewsdon*, [1938] Ch. 869, is of considerable interest as it deals, *inter alia*, with a point on which there appears to be some confusion, namely, the right of a surety to take proceedings, partaking of a *quia timet* nature, to protect himself before he has paid anything under his guarantee. X and Y obtain a joint loan from Z, but X stands surety to Z for the whole. The loan is expressed to be repayable on demand. X asks the Court to order Y to pay Z a moiety of the debt on X paying his moiety to Z, and he makes this claim even before Z has made a demand for repayment. The principal authority relied upon by X was *Ascheron* v. *Tredegar Dry Dock Co.*, [1909] 2 Ch. 401, which is made to support the proposition in *Chitty on Contracts* (19th ed.), p. 846, that the right of the surety to take proceedings in self-protection "arises as soon as there is an actual accrued liability on the part of the surety which he admits *and the creditor has demanded payment*". Relying on the explanation given of *Ascheron's Case* (in

which he had appeared as counsel) by Sargant, L.J., in *Re Berry-Anderson*, [1928] Ch. 290, Morton, J., stressed that the true position in the 1909 case was that there did exist a liability under the guarantee but that there had been no demand for payment made by the creditor. In the light of Sargant, L.J.'s statement, the contrary explanation of the case given by Eve, J., in *Bradford* v. *Gammon*, [1925] Ch. 182, must be deemed to be incorrect. Consequently, Morton, J., considered that the protective proceedings allowed by *Ascheron's Case* are maintainable even though no demand has been made by the creditor. But in the 1909 case the loan was not expressed to be repayable on demand; in the instant case it was so expressed. His Lordship held that this made no difference to the result, inasmuch as there is a long line of authorities establishing that a demand is not a condition precedent to the beginning of an action by a creditor in the case of a present debt and a promise to pay on demand, though "it is otherwise where the debt is not present but to accrue, as in the case of a note payable three months after demand, . . . or where the debt is not a present debt, but a collateral promise". On the construction of the facts of the present case, his Lordship held that there was a present debt, and, consequently, the plaintiff was given the order which he sought against the defendant.

The facts in *Greer* v. *Kettle*, [1938] A. C. 156, a case briefly noted in the *Annual Survey*, 1937, p. 145, *sub nom. Re Parent Finance Co., Ltd.*, may be summarised as follows: The A Co. advanced money to the B Co., which charged certain shares as security for the repayment of the loan. Amongst these were certain shares in the C Co. By an agreement of even date between the A Co. and the D Co., the D Co. guaranteed the payment of the debt of the B Co. In a schedule to this guarantee agreement, there was a recital of the charge, *inter alia*, on the shares in the C Co. At the date of this guarantee agreement, both the A Co. and the D Co. believed that the shares in the C Co. were validly issued. It was later discovered that this was not so and that the debt had therefore never been secured on these shares. The B Co. not having fully repaid the A Co., the liquidator of the latter company claimed the unpaid balance from the D Co. The House of Lords unanimously held that the D Co. was not liable. The only debt they undertook to guarantee was the debt secured on the shares in the C Co. and a debt so secured

never, in fact, existed. But did the recital in the schedule preclude them from denying that fact? On the construction of the facts of the case, the statement that the debt was secured on the shares in the C Co. was the statement of the B Co. and not of the D Co. Their Lordships approved of the decision of Patteson, J., in *Stroughill* v. *Buck* (1850), 14 Q. B. 781: "When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument." Lord Maugham pointed out that another road would lead to the same result. Equity would allow the rectification of a deed where it was based upon a common mistake of fact and then "to the extent of the rectification there can plainly be no estoppel on the original form of the instrument".

Restitution.

In *Racecourse Betting Control Board* v. *Mount*, 54 T. L. R. 1072, the defendant laid a bet on the "tote" and won £40 odd. The clerk, intending to pay him forty £1 notes, paid him forty £5 notes. Of this surplus payment, £85 was repaid by the defendant. The Board now claimed the recovery of the surplus unpaid and the defendant counterclaimed for the sum of £85 he had repaid. His contention was that Rule 4 of the Totalisator Rules made by the Board under the provisions of the Racecourse Betting Act, 1928, that "dividends should be examined before leaving these windows, as mistakes cannot be rectified later", applied bilaterally and operated whether the plaintiffs had paid a backer too much or too little. The Court of Appeal dismissed this plea and upheld the judgment given below for the Board on the claim and the counterclaim. The rule was of unilateral effect and did not refer to mistakes by way of overpayment by the Board; if it bore a different interpretation it was very arguable that it was *ultra vires* the Act of 1928. The Board's statutory duty was to distribute the stake moneys, less a percentage, to the winning ticket-holders, and it had no power to agree that moneys inadvertently paid out should remain in the posession of the donees without recourse by the Board to its ordinary common law rights to recover money paid under a mistake of fact. Moreover, the Court could not find evidence that the rule partook of the nature of a contractual term between the parties. The rule was a "statement of

practicability", and not an agreement as to liability. MacKinnon, L.J., hinted that if the Board had underpaid the defendant, and if it were perfectly easy to prove the mistake, *e.g.*, where payment was made by cheque, the Board could not rely on Rule 4 so as to achieve a manifest injustice.

The facts of *Gowers* v. *Lloyds and National Provincial Bank, Ltd.*, 54 T. L. R. 550, were that a retired colonial officer, G., in receipt of a pension, for ten years collected it from the defendant bank and thereafter, until his death, collected it through the post through the defendant bank by means of receipt forms sent to him by the plaintiffs. These forms included a certificate that the pensioner was alive. For six years after G.'s death the pension was collected by means of forged receipt forms and certificates. The plaintiffs sued the bank to recover the amount. The Court of Appeal dismissed the appeal against the judgment of Lawrence, J., in favour of the bank. In handing the receipt, which on the face of it purported to be signed by G., the bank did not impliedly warrant to the plaintiffs that they were acting for a principal, G., and that G. was alive. The nature of the document and of the circumstances of the case negatived the implication of any contractual obligation on the part of the bank to vouch for the existence, the identity and the signature of the pensioner. Had the money remained in the possession of the bank, it would have been liable to repay it to the plaintiffs under a long line of authority in the law of agency. But this rule does not apply where the agent has paid it away *bona fide* to the principal. The bank had here paid it in fact to its principal. "The fact that they thought he was somebody else does not alter the fact that it was that person for whom they were acting. It is to that person that they have paid away the money. In those circumstances, it appears to me that the fact that they were mistaken in thinking that their principal was G is quite irrelevant" (*per* Greene, M.R.).

Considerations of space preclude a lengthy discussion of a case very well worthy of detailed study, *Re Cleadon Trust*, [1938] Ch. 660, in which the relevant facts were that the appellant was one of the only two directors of a parent company which wholly owned two subsidiary companies, the boards of which were identical in composition with that of the parent company. The appellant advanced sums of money which were used to extinguish debts for which the subsidiaries

were liable and these extinctions operated to relieve the parent company of the corresponding liability which it had under its guarantee of payment of those debts. All three companies came to liquidation and in this action the appellant claimed to recover from the parent company (the assets of the subsidiary companies being insufficient to meet his claims) the sums so advanced by him. A vital factor in the case was that the company's articles required two directors to form a quorum; the appellant being an interested party, it could not be said that this requirement had been satisfied at any material time. The basis of his claim can be put under three heads, though it is a little difficult to disentangle their Lordships' discussion of the last two.

1. The claim on a real consensual implied contract was based on the authority of the proposition expressed in *Smith's Leading Cases*, 13th ed., Vol. 1, p. 156: "But if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done." The Court of Appeal unanimously rejected this claim. Two essentials for the operation of this principle are knowledge and acquiescence on the part of the person sought to be charged with the liability; the knowledge must be such as will lead "to the possibility of effective action by refusing to accept liability". Effective knowledge or acquiescence by the company was impossible in the absence of a properly appointed independent board.

2. The claim on a non-consensual "implied contract", or "quasi-contract", on a right of action "evolved by the common law courts on so-called equitable principles at a time when they had no equitable jurisdiction", also seems to have been unanimously rejected. This emerges most clearly from the judgment of Scott, L.J. Reiterating the desire which he expressed in *Morgan* v. *Ashcroft*, [1938] 1 K. B. 49, that "quasi-contractual" remedies should not be condemned to sterility, his Lordship, nevertheless, could find no established principle under this head which went to the relief of the appellant, but he could find two answers to the claim. First, "a voluntary payment of the debt of another, without request, and under no legal liability or compulsion, gives no claim for the money paid against the person whose debt is

discharged". Secondly, the "legal paralysis" of the company owing to the absence of a properly constituted board led to there being only "a mere semblance of a company"; "the company never had anything whatever to do with any of the transactions". Greene, M.R., who was on a slightly different tack, could find nothing in the principles applied in *Sinclair* v. *Brougham*, [1914] A. C. 398, sufficient to solve the problem of this case.

8. On the third ground for the claim their Lordships differed, Scott and Clauson, L.JJ., denying that the appellant could claim relief in equity, and Greene, M.R., thinking that he could. The principle of equity concerned was that stated in *Bannatyne* v. *MacIver*, [1906] 1 K. B. 108: "Where money is borrowed on behalf of a principal by an agent . . . though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal." On an investigation of the authorities, Clauson, L.J., concluded, and Scott, L.J., agreed with him, that this principle cannot be stretched to the point of creating an equity in favour of a person who has conferred a benefit on another completely behind his back and without any request made, or authority in any way given, by that other. Their Lordships considered that here the company had not requested, authorised, or used in any way the advances made by the appellant, and that the fact that the advances enured to the benefit of the company raised no equity in favour of the appellant. Greene, M.R., finding that the company had actually been benefited by the appellant's advances, considered that the authorities did not limit the application of the equitable principle to cases where the creditor has in fact been paid by the hand of a person having authority to pay the principal's debts. "In certain respects our law did advance some way towards recognising a doctrine of unjust enrichment, but the process was stopped short, leaving certain anomalies. . . . It may be that this principle of equity is to be explained on the same ground. The principle . . . appears to me a beneficent one, and I should be sorry to see its application cut down in the manner suggested." It is understood that an appeal is not con-

templated to the House of Lords, where the somewhat over-legalistic view of the majority Lords Justices could have been considered in a more liberal atmosphere. Mr. A. T. Denning, K.C., discussed the judgment of the trial Judge in his article on "*Quantum Meruit*" in the *Law Quarterly Review*, Vol. 51, p. 54, and approved of it. From a footnote attached to the article, it appears that his approval extends to the majority judgments in the Court of Appeal. A reference to an article on restitution generally by Sir William Holdsworth will be found in the Literature Section.

Mistake: Rescission.

Fowke v. *Fowke*, [1938] Ch. 774, is an interesting case in which the relevant facts were as follows. X married Y in 1911. Under a separation agreement of 1930, X agreed to pay Y an annuity during her life. In 1933, X obtained a decree absolute of nullity of marriage on the ground of Y's incapacity to consummate the marriage. In 1933, X married Z, who, on X's death in 1934, became his legal personal representative and the sole beneficiary under his will. Y now sued Z for arrears of annuity and claimed a declaration that the separation agreement of 1930 was valid and operative and that Z was bound to continue to pay her the annuity. Z pleaded that the decree of nullity put an end to the separation agreement and contended further that that agreement had been entered into under a common mistake of X and Y that they were in truth husband and wife and that that mistake was a fundamental one which avoided the agreement. Farwell, J., recognised that a marriage ceremony and consummation are two requisites of a legal marriage and that, if the marriage is not consummated, the declaration of nullity establishes that the marriage is and has been absolutely null and void in law. A decree of divorce ends the marriage as from the date of the decree; a declaration of nullity on the ground of bigamy establishes that the parties can never be considered as having been married at all. A decree of nullity on the ground of non-consummation differs from each of these other decrees. Until the decree, the parties are man and wife; no one can say that they are not legally married. The husband is bound to maintain the wife. But after the decree there is no marriage and there never has been a marriage in the eyes of the law. Nevertheless, odd as it may seem, they must be treated as having been husband and wife up to the date of the decree. Consequently, his Lordship held that in this case the parties, when they entered into the separation

agreement, must have been acting under a mistake of law and not of fact—the relevant fact must have been known to both parties. Another interesting ground for the judgment was that rescission could not be granted because it was impossible to make a *restitutio*: *sed quære* whether that rule was applicable here. (For a case of a marriage held void for duress, see *Hussein* v. *Hussein*, [1938] P. 159.)

Illegality.

The main interest of *Lurie* v. *Lurie*, 54 T. L. R. 889, for the purposes of this Section, lies in the view of Crossman, J., that, where an agreement is not one for the future separation of spouses living together but one providing for the reconciliation of spouses living apart, the insertion of a provision for future separation in the latter class of agreement is not contrary to public policy.

Poteliakhoff v. *Teakle*, [1938] 2 K. B. 816, provides a good example of an unsuccessful attempt to press too far the principle of *Hyams* v. *Stuart King*, [1908] 2 K. B. 696. The alleged new consideration for a promise to pay a gaming debt was the plaintiff's forbearance to sue the defendant. The Court of Appeal had no difficulty in holding that this alone was insufficient. The publicity, the avoidance of which was deemed to amount to a new consideration in the principal case, is not publicity arising out of a suit brought on the void contract but publicity which will be given "by posting at Tattersall's and the like" (*per* Slesser, L.J.). The connection between these cases and the law relating to demanding with menaces has been the subject of some comment in legal literature recently (see the *Law Quarterly Review*, vol. 55, p. 5).

The House of Lords affirmed the decision of the Court of Appeal in *Beresford* v. *Royal Insurance Co.*, [1938] A. C. 586, reviewed in the *Annual Survey*, 1937. Their Lordships agreed that a contract to pay the sums assured to the executors or assigns of a person who intentionally killed himself would be contrary to public policy on the principle that "a man is not to be allowed to have recourse to a Court of justice to claim a benefit from his crime, whether under a contract or under a gift". The ban must also fall upon his representatives. Lord Atkin mentioned *obiter* that he could see no objection to an assignee for value before the suicide enforcing a policy which contains an express promise to pay upon a sane suicide. Lord Macmillan expressly reserved his opinion upon this question. On the rest of their

Lordships' remarks little need be said, as they carry matters no further than did the judgment of Lord Wright in the Court of Appeal.

Parties.

In view of the reference in the sixth interim report of the Law Revision Committee to the decision in *Re Engelbach's Estate*, [1924] 2 Ch. 348, mention may here be made of the cases discussed in the Property Section which refer to that decision—*Re Sinclair's Life Policy*, [1938] Ch. 799, and *Re Foster, Hudson* v. *Foster*, 54 T. L. R. 998.

Assignments.

The decision of Goddard, J., discussed in the *Annual Survey*, 1937, p. 157, was affirmed by the Court of Appeal in *Peters* v. *General Accident Fire and Life Assurance Corporation*, 54 T. L. R. 668. It is good law and good sense that a motor insurance policy is a contract of personal indemnity and that insurers should not be compelled to accept risks in respect of third parties who may be quite unknown to them.

Coleridge-Taylor v. *Novello & Co.*, [1938] Ch. 850, dealt with the assignment of copyright and is more appropriately discussed elsewhere.

Re Warren, Wheeler v. *Mills*, [1938] Ch. 725, whilst adding little to the law, may be mentioned as giving an illustration of what may constitute an equitable assignment.

Part of the interest of *Skipwith* v. *Homewoods Sawmills*, [1938] 2 All E. R. 788, lies in the short reference by Morton, J., to the fact that in his view the cases relating to the assignment of part of a debt do not cover a case such as this where part of the benefit of a contract of sale of timber was assigned.

The decision of Lord Hewart, C.J., in *Nokes* v. *Doncaster Collieries*, 55 T. L. R. 1, sounds very strange to those accustomed to think that a contract of personal service is not assignable. The question at issue was whether the appellant's contract of service with the A Co. had been transferred to the B Co. by an order under the Companies Act, 1929, s. 154, made by the High Court. The section is intended to facilitate the reconstruction and the amalgamation of companies and it does so by empowering the Court to sanction such arrangements and to make provision, *inter alia*, for "the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company". "Property" is defined as

including "property rights and powers of every description". The Divisional Court considered that this definition was wide enough to include contracts of service made with the transferor company. The arguments adduced for this interpretation were not very convincing. Charles, J., remarked that "the purpose of the section being to facilitate amalgamation and transfers, to him it was quite inconceivable that the contract of service does not pass with the other property and rights under this section". Lord Hewart said: "In one sense, it is no doubt true to say that such a contractual right is personal. It is personal because it has to do with persons, and it is a right to personal service. When looked at from another point of view, however, a right of that kind, and a body of rights of that kind, may be regarded as of the nature of property. There passes from the transferor company . . . to the transferee company a body of rights, including rights connected with, and arising out of, the employment of men in a mine."

Interpretation.

In *Northern Ontario Power Co., Ltd.* v. *La Roche Mines, Ltd.*, [1938] 3 All E. R. 755, the A Co., a mining company, agreed with the B Co., a power company, to take electricity from the B Co., the contract to "extend for the mining life of the properties now or hereafter operated or owned or controlled by the consumer in the Porcupine district". The contract was not assignable save with the consent of the B Co. The A Co. sold its properties to the C Co., no assignment being made of the power agreement as the C Co. did not wish to be bound by it. In the liquidation of the A Co. the B Co. claimed damages for breach of contract. The Judicial Committee agreed with the contention of the A Co. that it had committed no breach of contract. "The mining life" of the properties must be interpreted to mean the mining life whilst the properties were operated, owned or controlled by the A Co. A contrary view would attribute to the parties "an intention to impose and to assume a most unusual liability—namely, a liability in respect of property which the party liable neither occupies, owns, nor controls. It would require very plain words to establish such an intention."

A charterparty contained a clause empowering the charterers or owners to cancel it "if war breaks out involving Japan". Goddard, J., in *Kawasaki K. K. K. of Kobe* v. *Bantham S.S. Co.*, [1938] 61 Ll. L. Rep. 131—and his judgment has now been affirmed by the Court of Appeal (*The Times*

newspaper, March 8, 1939)—said that the parties must be taken to have used the term "war" "in the sense in which an ordinary commercial man would use it, or, if one may so put it, as the captain of a tramp steamer would interpret it". They must not be bound by the niceties of international law, or the expression of opinion of the Foreign Office as to whether a war, in the strict legal sense, existed or not. With this may be contrasted the view of Lewis, J., that "blockaded" in the war clauses of the charterparty there involved meant "blockaded" in the legal sense: *Spanish Government* v. *North of England S.S. Co.*, [1938] 61 Ll. L. Rep. 44.

Breach of contract. Variation of contract.

In *Harrods* v. *Geneen*, [1938] 4 All E. R. 493, arose a point which MacKinnon, L.J., suggested as appropriate for the consideration of law students at a moot. The plaintiffs were commissioned by the defendant to find a tenant who would pay rent in advance. They proposed a tenant who was willing to pay rent in arrear. The defendant accepted this tenant and then changed his mind. On a claim by the plaintiffs for recovery of damages for being prevented from earning their commission, the defendant pleaded that they had given him no consideration for any variation of the original contract. Slesser and Finlay, L.JJ., held that there was consideration in the form of mutual promises which could be expressed thus: "We promise to produce a client who will pay rent in arrear if you promise to agree that we fulfil our contract by doing so." The defendant, in effect, said: "Very well, I agree to it." MacKinnon, L.J., dissented. The analysis was that the defendant said to the plaintiffs: "You have produced this tenant who does not fulfil my conditions. I will accept her as tenant and treat you as having fulfilled your original contract." That was, in his Lordship's view, a *nudum pactum*. When this promise was made, the original contract was over and done with and remained unfulfilled and no consideration was given by Harrods for the second promise. He admitted that the plaintiff would have been liable had he accepted the benefit of what they had done by completing the lease with the tenant whom they proposed.

Solicitor and client.

The Court of Appeal in *Groom* v. *Crocker*, [1939] 1 K. B. 194, affirmed the decision of Hawke, J., reviewed in the *Annual Survey*, 1937, pp. 175, 187, 311, with a variation in the amount of damages awarded. It will be recalled that

solicitors acting for insurers, on the latter's instructions, entered a defence on behalf of the insured, without his knowledge or consent, admitting that the accident was caused solely by his negligence—a course of conduct "as unjustified in point of law as it is assuredly repellent to the sense of business decency". The object was to benefit the insurers under a "knock for knock" agreement with the insurers of the other party involved in the accident with the insured. The Court considered that the solicitors were bound to act *bona fide* in the common interest of the insurers and the insured. Their contractual duty was to conduct the case properly on behalf of the insured, subject to any proper exercise by the insurers of the right of control over the proceedings conferred upon them by the policy. It was a highly improper exercise of that right for the insurers to allow their judgment to be influenced by the desire of obtaining a gain under the "knock for knock" agreement—with which the insured had no concern. Scott, L.J., hinted that the sooner such agreements came for adjudication before the Courts the better it would be for all concerned. The damages were to be assessed in this case on the basis of a breach of contract and not the commission of a tort, and, in contract, the damages cannot be at large, as in the tort of negligence. Consequently, the Court disallowed the sum given by Hawke, J., in respect of the judgment entered against the insured in the original action; he had suffered no pecuniary damage thereby as the insurers had immediately paid that sum to the other party. Damages could not be claimed for any mental suffering, holding up to disapproval, or for injury to reputation as a careful driver. "No pecuniary loss arose from them, and no reasonable probability of pecuniary loss could be shown. The suggestion that in some future proceedings in relation to a motor car accident the respondent might be placed at some disadvantage by having these admissions on record is too remote and fanciful to support an award of damages" (Greene, M.R.). The case of damages being granted on a breach of a banker's contract with his customer was distinguishable; "in such cases, it is the commercial credit of the customer that is injured, and the inference arises that pecuniary loss will necessarily ensue". The damage for breach of duty must, therefore, be nominal in this case. The question of libel is discussed below in the Tort section. (In connection with this case, it is worth mentioning the decision

of the Court of Appeal (Slesser, L.J., dissenting) in *Windsor* v. *Chalcraft*, [1938] W. N. 229, allowing the application of insurers to set aside a judgment obtained against the insured who had let it go by default.)

Frustration.

The question of frustration of contracts has been in fair evidence during the year. The case which is likely to attract the greatest attention is *W. J. Tatem, Ltd.* v. *Gamboa*, [1938] 3 All E. R. 135, where Goddard, J., remarked: "I doubt whether it is possible to reconcile all the judgments and opinions which have been given on this difficult subject, which, of course, was a subject which was very little discussed in the books before the War. . . . It seems to me . . . that, if the true doctrine be that laid down by Lord Haldane—the absolute disappearance of the contract—or if it be as Viscount Finlay put it—'the continued existence of a certain state of facts'—then whether circumstances are foreseen or not makes very little difference. If the foundation of the contract goes, if something is swallowed up in an earthquake, it goes, whether or not the parties have made provision for it. Whether or not the parties contemplated, or must have contemplated, that the foundation of the contract would be destroyed cannot alter the position at all. If it comes about, it comes about, although the parties may or may not have agreed as to what is to happen if there is destruction. Therefore it seems to me that, when one is using the expression 'unforeseen circumstances' in relation to the frustration of the performance of a contract, one is really dealing with circumstances which are unprovided for, circumstances for which (and in the case of a written contract one has only to look at the document) the written contract makes no provision. . . . One makes the intention plain by saying that, if the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, parties can if they wish (and no doubt they often do) provide for what in that event is to happen, but, if they do not, then the performance of the contract is regarded as frustrated." Taking this view of the basis of the doctrine, his Lordship held that the seizure of a ship by the forces of General Franco, although it might have been within the contemplation of the parties when they entered into the contract, destroyed the foundation of the contract and, there being no contrary provision in the

charterparty, frustrated the adventure. There is bound to be a debate whether this "objective" test truly represents the basis of the doctrine, and the supporters of the affirmative and of the negative view will not be without abundant support from the authorities. After the debate is over, the common ground between the parties will probably be, in the words of Professor Gutteridge, that "it would seem that there is a very strong case for an authoritative restatement of the doctrine by the House of Lords" (*Law Quarterly Review*, Vol. 51, p. 111).

One of the arguments in *H.* v. *H.*, 54 T. L. R. 1000, was that a separation agreement, executed before the enactment of the Matrimonial Causes Act, 1937, was terminated by that enactment, on the principle that an implied term must be read into it that it was not to survive a material change in the law applicable to it. Merriman, P., rejected this contention. In *Hyman* v. *Hyman*, [1929] A. C. 601, it was held that a wife, who had covenanted by deed of separation not to take proceedings against her husband for alimony or maintenance beyond the provision made for her in the deed, was not thereby debarred from taking advantage later of circumstances which arose subsequent to the deed of separation which qualified her to claim the benefit of the provisions now consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925, for dissolution of marriage on the ground of her husband's adultery, then for the first time made a ground of dissolution at the instance of the wife. It was also held that the agreement between the parties could not prevent the Court from exercising the consequent function imposed upon it by statute of making provision for the wife. But in the instant case the wife was seeking to raise, and use as the basis of her plea for relief, certain charges of cruelty which she had expressly abandoned under her separation agreement and the President could not agree that the principle of frustration could apply in such circumstances merely because the Act of 1937 had, in the interval, made cruelty a ground for divorce. To accept such a contention would be to upset a large number of settlements of every description made on the basis of the law as it stood when they were made. Nothing in the new law made the performance of the separation agreement either unlawful or impossible.

In *Aerial Advertising Co.* v. *Batchelors Peas, Ltd.*, [1938]

2 All E. R. 788, the plaintiffs had contracted with the defendants to advertise their commodities from the air. To the horror of the defendants, they saw one of the plaintiffs' pilots doing so during the Armistice ceremony, with disastrous results to the defendants' business. They counterclaimed that this amounted to frustration by act of party, and Atkinson, J., agreed that the result was to make it commercially wholly unreasonable to carry on with the contract and that the defendants were released from further performance of it. A further question of interest was whether his Lordship could give general damages or only special damages for the pecuniary loss actually proved. He held that he could give general damages for pecuniary loss, though he had to take care not to give damages for loss of reputation through the breach of contract. The expense undertaken by the defendants in issuing advertisements to try to undo the mischief done by the plaintiffs' pilot was held reasonable and recoverable.

Implied warranty.

Hoskins v. *Woodham*, [1938] 1 All E. R. 692, reinforces the view that the principle of *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113, does not extend to establishing that there is an implied warranty of fitness for human habitation upon the purchase of a new house from a builder if the house is completed at the time of sale. The principal case only deals with the purchase of houses in the course of construction.

Merger.

A very interesting point in the opinion of the Judicial Committee in *Knight Sugar Co., Ltd.* v. *Alberta Ry. and Irrigation Co.*, [1938] 1 All E. R. 266, is that the ordinary rule of merger of an agreement of sale in the executed conveyance applies to the case of an agreement for sale followed by a statutory transfer of registered land. For the purpose of the rule of merger, the registered transfer differs in no relevant respect from an ordinary conveyance of unregistered land.

LITERATURE

New Works

Impossibility of Performance in Contract. By Rudolf Gottschalk. London: Stevens & Sons. xvi and 146 pp. 7s. 6d.

This monograph, the sum and substance of which might easily have been compressed into two articles of moderate length, is divided into three parts and an appendix. Part I deals with the development of the doctrine of supervening impossibility in English Law. It has its usefulness as a collection of cases. Part II is described as an "Investigation of the Problem in Principle". In substance, it boils down to what Roman Law said, or would be deemed to say, on the problems arising in this part of the law. The Author commends those English Courts which have invoked the aid of Roman Law ("which dealt with the problem in an admirable manner") but remarks that the Roman Law, if it is to be of any help in the practical solution of modern problems, "must be explained in a clear and intelligible manner, a task of great difficulty in view of the necessity of reconstruction and the conflicting views held with regard to corrupt texts". Part III summarises some American criticisms of the doctrine and the restatement of it by the American Law Institute, and, on the whole, this is the most useful part of the monograph. The Appendix is useful as it gives summaries of the rules on the subject adopted by the Roman-Dutch, German and French systems. The work suffers from diffuseness in parts. It is impossible to embark on a detailed criticism in this *Survey*, but it might be pointed out that this publication is not an "Annual Survey of the London School of Economics" but of English Law by members of the staff of the School!

Articles

The question which has been most to the forefront this year has been that centring round the topics of restitution, unjust enrichment and "quasi-contract". The American Restatement of the Law of Restitution led to instructive and exhaustive reviews of it by Messrs. Warren A. Seavey and Austin W. Scott, and by Professor Winfield in the *Law Quarterly Review*, Vol. 54, pp. 29, 529, and an excellent long note by Mr. D. W. Logan in the *Modern Law Review*, Vol. 2, p. 153, where the various schools of thought on "quasi-contract" are explained concisely. The cases on restitution described in the *Annual Survey*, 1937, occasioned the exhaustive review of "The Principle of Unjust Enrichment" by Dr. W. Friedmann in the *Canadian Bar Review*, Vol. 16, pp. 243, 365, where the author discusses the doctrine

in German law, the technical structure of English law in relation to the subject, the principal considerations, legal and sociological, underlying the law, and the spread of the principle over different sections of English law. The most influential exponent of the principle of "æquum et bonum" in England, Lord Wright of Durley, contributed to the *Cambridge Law Journal*, Vol. 6, p. 305, his views on *Sinclair* v. *Brougham*, [1914] A. C. 398, and made it a peg for hanging on it his strong conviction that the theory of the implied contract is a "superfluous solecism", the room of which is better than its company. The exponents of the theory have not been without their ardent champions from Oxford, Messrs. G. R. Y. Radcliffe and Landon entering the fray with sharpened rapiers in the form of notes in the *Law Quarterly Review* (Vol. 58, p. 304; Vol. 54, p. 24), and a mighty Blücher in the shape of Professor Holdsworth bringing up some weighty, if somewhat age-worn, reserves in his article in the *Law Quarterly Review*, Vol. 55, p. 37. Whilst this battle was being furiously fought on the main front, Dr. C. K. Allen made a flank attack of considerable weight in his article in the *Law Quarterly Review*, Vol. 54, p. 201, on "Fraud, Quasi-Contract and False Pretences", the immediate occasion of which was the decision in *Berg* v. *Sadler and Moore*, [1937] 2 K. B. 158, which, from the criminal aspect, he regards as a most doubtful application of the law relating to false pretences. Discussing *Morgan* v. *Ashcroft*, [1938] 1 K. B. 49, Dr. Allen tilts at both sides in the "quasi-contract" controversy and suggests that they are tilting against two sides of the one shield and that the blood and thunder is not necessary as there is, in fact, little variance between them. But Dr. Allen himself was not to get away from the fray without being himself engaged in combat with the redoubtable Editor of the *Law Quarterly Review* (Vol. 54, p. 216), who, in a note on "Fraud and Restitution", questions and challenges some of Dr. Allen's propositions in his attack on *Berg* v. *Sadler*. In the Southern Hemisphere, there were echoes of the conflict in Mr. A. J. McGregor's article on "Unjustified Enrichment" in the *South African Law Journal*, Vol. 55, pp. 4, 167. Outside the field of battle, Professor Harper and Miss McNeely were working out "A Synthesis of the Law of Misrepresentation", and presented their rationale of it in the *Minnesota Law Review*, Vol. 22, p. 939.

The smell of powder also hangs around Mr. C. J. Hamson's vigorous and penetrating analysis of the Sixth Interim Report of the Law Revision Committee on the law of consideration in his article in the *Law Quarterly Review*, Vol. 54, p. 288, where he punches and pats the authors of that unfortunate document with equal kindness, sincerity, and force. The red flag of revolution against the accepted doctrines of Anson and others on the subject of mistake and misrepresentation is raised by Professor J. D. I. Hughes in his monograph on "Consensus and Estoppel" in the *Law Quarterly Review*, Vol. 54, p. 870. The traditional method of approach to the "classes of mistake affecting contracts", which starts from the standpoint of the content of the error, is attacked, and it is suggested that the legal analysis should be based on the objective reasons for the error, *e.g.* (i) the non-correspondence of expressions with the intention of the party using them, or, where the expressions do so correspond, the non-correspondence of understanding on the part of the party to whom they are made with the intention of the party using them; (ii) latent ambiguity; and (iii) the conduct of the parties.

Reference was made last year to Professor K. N. Llewelyn's studies on the Law of Sales. This year, the same learned author has contributed two studies to the *Yale Law Journal*, Vol. 47, p. 1248; Vol. 48, p. 1, on "The Rule of Law in our Case-Law of Contract", "the rule of law" being what we generally term "the theory of judicial precedent", which is specifically considered in the field of offer and acceptance. His disciple, Mr. M. S. Mason, follows in the footsteps of the master in his contribution on the subject of "A Theory of Contract Sanctions" in the *Columbia Law Review*, Vol. 38, p. 775, which contains a factual analysis of a number of different contractual situations. In view of what was said last year in this Section on *The Valverda*, [1938] A. C. 173, it is of interest to note Mr. Bora Laskin's article in the *Canadian Bar Review*, Vol. 16, p. 669, on "The Protection of Interests by Statute and the Problem of 'Contracting-out'". In the *Conveyancer and Property Lawyer*, Dr. Edmund Davies reviews the Hire-Purchase Act, 1938 (Vol. 3, p. 125), and Messrs. Preston and Newsom dwell at length on "Restrictive Covenants affecting Land". From the comparative point of view, interest centres on Dr. E. J. Cohn's

contribution on "Contracts of Service in Comparative Jurisprudence" in the *Journal of Comparative Legislation*, Vol. 20, p. 45, and on "The Form of Contracts of Guarantee" in the *Law Quarterly Review*, Vol. 54, p. 220, a subject of topical interest in view of the dissenting report in the Sixth Interim Report of the Law Revision Committee on the Statute of Frauds. In the *Illinois Law Review*, Vol. 32, p. 899, Professor W. W. Cook contributes a learned article on "Contracts and the Conflict of Laws: Intention of the Parties". In the same volume Professor Denson Smith writes shortly on "Some Practical Aspects of the Doctrine of Impossibility" (p. 672).

Other articles of value may be found in the *Law Journal*, the *Solicitors' Journal* and the *Law Times*.

THE LAW OF TORT

1988 was a normal year in this field of law. There was little legislation directly affecting the Law of Tort, but the crop of cases was heavy.

LEGISLATION

1 & 2 Geo. 6, c. 52.

Despite the wide powers given to the Commissioners under the *Coal Act*, 1988, they cannot license any person to interfere with the surface of any land, to withdraw support from any land, or to do any other act which would be actionable as a trespass or as a nuisance and which, if done, would be likely to cause actual damage other than of a purely nominal amount (section 15).

1 & 2 Geo. 6, c. 53.

Several provisions of the *Hire-Purchase Act*, 1988, indirectly affect the Law of Tort. Thus, section 10 relates to evidence of adverse detention in actions by owners to recover possession of the hired goods, but nothing in the section is to affect a claim for damages for conversion. Section 11 places restrictions on the owner's right to recover possession of goods otherwise than by action. Section 16 affects the question of distress of hired goods. Section 17 enacts that "if, whilst by virtue of this Act the enforcement by an owner of a right to recover possession of goods from a hirer is subject to any restriction, the hirer refuses to give up possession of the goods to the owner, the hirer shall not, by reason only of the refusal, be liable to the owner for conversion of the goods".

CASE LAW

Volenti non fit injuria.

One of the most interesting cases of 1988 was *Dann* v. *Hamilton*, [1989] 1 All E. R. 59, where the plaintiff had been injured whilst travelling as a free passenger in a car driven by H., who had been drinking and who drove dangerously and in an erratic manner even before the accident took place. During the journey the plaintiff did have the opportunity, after she had become aware of these facts, to leave the car when it stopped to disembark another passenger, but she did not take it. Asquith, J., complained of the paucity of authority to guide him on the question of the

applicability of the defence of *volenti* in a non-contractual case of this kind. He remarked: "Some text-book writers of authority, notably *Beven on Negligence*, 4th ed., at p. 790 [796 ?], roundly deny that the maxim applies to cases of negligence at all. This is a hard saying, and must be read, I think, subject to some implied limitation. Where a dangerous physical condition has been brought about by the negligence of the defendant, and, after it has arisen, the plaintiff, fully appreciating its dangerous character, elects to assume the risk thereof, the maxim has often been held to apply. . . . Where, however, the act of the plaintiff relied on as a consent precedes, and is claimed to license in advance, a possible subsequent act of negligence by the defendant (and this, I think, must be the case Beven had in mind), the case may well be different. . . . With some qualifications, *Pollock on Torts*, 13th ed., supports Beven's *dictum*, declaring at p. 172: 'The whole law of negligence assumes the principle of *volenti non fit injuria* not to be applicable.' . . . 'A man is not bound at his peril to fly from a risk from which it is another's duty to protect him, merely because the risk is known.' . . . Cannot yet a further step be safely taken? I find it difficult to believe, although I know of no authority directly in point, that a person who voluntarily travels as a passenger in a vehicle driven by a driver who is known by the passenger to have driven negligently in the past is *volens* as to future negligent acts of such driver, even though he could have chosen some other form of transport if he had wished. Then, to take the last step, suppose that such a driver is likely to drive negligently on the material occasion, not because he is known to the plaintiff to have driven negligently in the past, but because he is known to the plaintiff to be under the influence of drink. . . . Ought the result to be any different? After much debate, I have come to the conclusion that it should not, and that the plaintiff, by embarking in the car, or re-entering it, with knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to, or absolve the driver from liability for, any subsequent negligence on his part whereby the plaintiff might suffer harm. There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, [like] inter-meddling with an unexploded bomb or

walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim *volenti non fit injuria* would apply, for in the present case I find as a fact that the driver's degree of intoxication fell short of this degree." A perusal of the report of the case leaves the uneasy impression that this finding of fact was a merciful acceptance of the line of least resistance; the plaintiff asked for trouble and got it. An interesting part of the judgment is where his Lordship dealt incidentally with the point that, as H. was guilty of the criminal offence of being drunk in charge of a car, the circumstances excluded the operation of the defence of consent. The rather cryptic comment was: "This seems to me to be open to question, and I prefer to base the present judgment on the grounds indicated above." One sympathises with his Lordship and with the injured plaintiff, but the case leaves a sense of dissatisfaction with the decision of fact and with the investigation of the principles of law. In the criminal and the civil law there still remains the need for an authoritative exposition of the law relating to the defence of consent.

In *Gillmore* v. *L.C.C.*, 55 T. L. R. 95, where the plaintiff, who had joined a physical training class run for a small fee by the defendant council, was injured whilst performing an exercise, consisting of hopping on one leg and plunging at other members of the class, by slipping on the "fairly highly polished" floor which was normally used for dancing, du Parcq, L.J., sitting as an additional Judge, had little difficulty in finding a breach of duty by the council and rejecting the defence of *volenti*. The plaintiff accepted the risk of the exercise, but he did not accept the added danger caused by the unsuitable floor; he trusted those who invited him and those in command of the training. (*Cx. Pitt* v. *Jackson*, below.)

Right of recaption.

It is a little difficult to know where to classify *Kearry* v. *Pattinson*, [1939] 1 All E. R. 65, a case apparently fought on a claim of detinue or conversion. Some of the plaintiff's bees swarmed and settled on the land of the defendant, who refused to allow the plaintiff to enter thereon to retake them, whereby they were lost to the plaintiff. The Court of Appeal followed the passage in Blackstone's *Commentaries*, Book 2, pp. 392–3, following Bracton and the Institutes of Justinian, which declares that bees are *feræ naturæ*, but, when "reduced into possession" by hiving, may be the subject of "qualified

property". This property lasts even after the bees have subsequently swarmed out of the hive so long as the proprietor can keep them in sight and has the power to pursue them; an interference with his rights during this stage may be actionable. But thereafter, they relapse into the state *feræ naturæ* and cease to be the property of the erstwhile owner; they can then be taken without any right of action on his part. What power of pursuit has the owner? Slesser and Goddard, L.JJ., without entering into any unnecessary consideration of the matter in all its aspects, contented themselves with the general rule that a man has generally no right to enter without leave on the land of another to retake his chattels. Slesser, L.J., admitted the existence of some authorities giving the right of entry for re-caption, but doubted their relevance, and, in any case, saw no reason for their application to the case of pursuit of bees. Goddard, L.J., made two observations, as corollaries to the main view of the case, which are worthy of note. The first was that the defendant in this case would have been entitled to reduce the bees into his own possession when they were on his land. The other was that "if bees settle on my tree and another manages to get on to my land before I do, they become that person's property" if the other, be he trespassing or otherwise, manages to reduce them into his possession. The plaintiff failed in his action whether he based it on conversion or on denial of right of entry. Leave to appeal to the House of Lords was given on terms.

Statutory authority.

The number of cases involving consideration of statutory rights and duties was very considerable in 1938. Most of them will fall for discussion under more specific heads, but two cases raising directly the issue of the defence of statutory authority were *Edginton, Bishop and Withy* v. *Swindon B. C.*, [1939] 1 K. B. 86, where the erection of an omnibus shelter was held to be by way of reasonable exercise of a statutory power and not actionable as an interference with the rights of adjacent property owners, and *Hanscombe* v. *Bedfordshire C. C.*, [1938] Ch. 944, where the decision went the other way, the highway authority being held not to be protected by the provisions of the Highway Acts against liability for such trespass against owners of land abutting on the highway as was committed in this case. A noteworthy passage from the judgment of Farwell, J., reads: "When, therefore, the whole portion of a highway which is bounded by a fence or hedge

is capable of being used to pass and re-pass, the whole portion is deemed to have been dedicated to the public. When, however, a portion of the whole is a ditch which *prima facie* is not adapted for the exercise by the public of their right to pass and re-pass, the presumption, in my judgment, is that the ditch does not form part of the highway. That is a presumption which may be rebutted (see *Chorley* v. *Nightingale*, [1906] 2 K. B. 612), but the onus lies on those who assert that the ditch is part of the highway."

Infant appellants.

Walsh v. *George Kemp, Ltd.*, [1938] W. N. 120, though falling more appropriately under the Procedure Section, is of such practical importance in this branch of the law that it deserves a reference here. An infant plaintiff was awarded damages; the defendants entered an appeal; subsequently, a settlement was arranged whereby the damages were reduced. Charles, J., approved the settlement under the provisions of Order XXII, r. 14. Greer, L.J., intimated that as soon as an appeal is entered the Court of Appeal has seisin over the matter and that, therefore, an application must be made to that Court for approval of the settlement.

Master and servant.

A very substantial number of cases decided during the year related to the position between master and servant. Many of them are considered under other headings in this Section and others are left for discussion in the Section on Industrial Law.

Common employment.

Last year attention was drawn to the unsatisfactory decision of the Court of Appeal in *Radcliffe* v. *Ribble Motor Services*, 54 T. L. R. 260, and it was criticised as "a remarkable application, to say the least, of the test which Professor Winfield and others have suggested for common employment, namely, that 'the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the other'". This questionable decision obviously determined the course taken by Macnaghten, J., in *Metcalfe* v. *London Passenger Transport Board*, 54 T. L. R. 678, where the plaintiff, an omnibus driver, had been injured owing to the negligence of a tram driver, who was also in the employment of the plaintiff's masters. The routes of the omnibus and the tram seem to have been common for some distance. On one head, his Lordship's judgment was obviously right; it was no ground for the rejection of the plea of common employment to say that the common master was a vast corporation into which had been amalgamated the two smaller

bodies to which the two drivers had respectively been attached as employees prior to the amalgamation. The effect of the amalgamation "was, no doubt, to increase enormously the number of the plaintiff's fellow-servants, but whether a servant has but one fellow-servant or ten thousand cannot affect the application of the doctrine of common employment." That is true, but the large-scale dimensions of modern business units are a factor for consideration outside the Courts in relation to the possibility and desirability of remedial legislation. On the second head, the question whether the two drivers could be said to be in common employment within the meaning of the doctrine, his Lordship's decision is much more questionable. Following the bad course set by the Court of Appeal, he felt constrained to hold that the two drivers were in common employment and to ignore the principle laid down by Sir Francis Jeune, P., in *The Petrel*, [1893] P. 320, which is embodied in the test indicated by Professor Winfield to which reference was made above. Referring to that case, his Lordship stated that he did not think that the suggested analogy between vessels at sea and vehicles in the streets held good. With respect, the question is not whether the servants involved are at sea or on the streets, but whether the safety of one is in the ordinary run of things dependent on the care and skill of the others. Seamen on the ferry-boats on the Mersey, which constantly, day in day out, cross and recross the paths of one another with very little space to spare, may well be within the doctrine, whilst drivers of vehicles on different routes which are rarely coincident may well be outside it. A long note by Mr. J. Unger on these cases is worthy of perusal: *The Modern Law Review*, Vol. 2, p. 43.

(As we go to press, the newspapers report the decision of the House of Lords in the *Radcliffe Case*. The details of the speeches cannot be discussed this year, but it is clear that they amount to a complete vindication of the principles laid down in *The Petrel*. The *Metcalfe* decision does not appear to have been discussed, but it appears to be very questionable, though not entirely unmaintainable, after the House of Lords decision.)

Who is t master?

Willard v. *Whiteley, Ltd.*, [1938] 3 All E. R. 779, was a case where the plaintiff owned a number of lorries. The defendants, furniture removers, hired a lorry for which they paid a lump sum, the wages of the driver and the men being

paid by the plaintiff. The defendants could order the driver to go where they wanted him to go, and to go at the times they desired, but they had no power to dismiss him and any complaints, *e.g.*, concerning his driving, would be made to the plaintiff. The plaintiff sought to recover damages for an injury to the lorry, but the Court of Appeal agreed with the County Court Judge that he could not recover as the driver was still in his employment, and not in that of the defendants, when the damage was occasioned. If *Leggott* v. *Normanton* (1928), 98 L. J. K. B. 145, decided anything to the contrary, their Lordships were prepared to dissent from it.

Liability for forgery.

Uxbridge Permanent Benefit Building Society v. *Pickard*, [1938] 1 K. B. 266, has gone on appeal, but the judgment of Atkinson, J., is worthy of interim attention. The defendant, P., a solicitor practising in London, had a branch office at Slough, managed by C. The plaintiffs were induced by a fraud, to which C. was a party, to advance money to X, alleged by C. to be a client of the Slough branch, on mortgage of freehold property. The supposed title to the property was fictitious and the deeds were forgeries. The plaintiffs claimed damages against the innocent P. on the basis that he was responsible for the fraud of his agent. Alternatively, they claimed the amount of their advance as money had and received to their use. In a considered judgment, his Lordship held that the case fell within the principle of *Lloyd* v. *Grace, Smith & Co.*, [1912] A. C. 716, as the fraud was something done within, if not the actual, yet the apparent, authority of the agent. The real trouble felt by his Lordship was caused by the alleged rule that forgery can never be within the presumed or ostensible authority. *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439, he considered of no help to the defendant as there was no evidence of a holding-out or of any authority of the agent in that case. Similarly, *Kreditbank Cassel* v. *Schenkers*, [1927] 1 K. B. 826, contained nothing suggesting that forgery can never be within the apparent authority. More aid was derivable from a *dictum* by Wright, J., as he then was, in *Slingsby* v. *District Bank*, [1931] 2 K. B. 588, which was wide enough to admit the plea relating to forgery to be based on it. But the learned Judge could not consider himself bound by it as it was based on the above two cases, which lent it no support in its widest form, and because the Court of Appeal in *Slingsby's Case* gave it no support. Forgery must be treated just like any

other fraud and, if it comes within the ostensible authority of the agent, the principal is liable for it.

Other master and servant cases are dealt with under different headings in this Section. Amongst the cases considered in other Sections of the *Survey*, special attention is drawn to the decision of the House of Lords in *Avery* v. *L. & N. E. Ry.*, [1938] A. C. 606, reviewed in the Industrial Law Section.

Joint tortfeasors: contribution.

Two cases raising the question of contribution between joint tortfeasors give the impression of being rather severe. In *Ryan* v. *Fildes*, [1938] 3 All E. R. 517, a case to be considered together with the later cases mentioned in this Section relating to the position of the managers of non-provided schools, the plaintiff, an unruly scholar, was given a box on the ear by the school-mistress, who, at the time, was in charge of a class of forty-six boys. The blow, though a moderate one, rendered the plaintiff deaf in one ear and was held by Tucker, J., to have exceeded the bounds of reasonable and lawful correction; it was not a proper or usual way of punishing a child, nor such as the parents of a child might expect that a child "would receive at a school in these days". The mistress was liable and she was held to have acted as the servant of the managers, who were sued with her. Even had they proved, which they did not, that they had limited her powers, as the act of punishment was within the general scope of her powers, the managers could not, in his Lordship's opinion, plead as against third parties a limitation not made known to such third parties. They were vicariously liable, but a complete indemnity was ordered in their favour. His Lordship thought the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (2), was wide enough to allow a 100 per cent. contribution despite the fact that the word "indemnity" had not been used in the section. He was not impressed by the argument advanced on behalf of the mistress that the managers should not be granted a complete indemnity on the ground that by putting her in charge of such a large class they were inviting the kind of trouble which actually occurred.

That there is need for further review of the rules of procedure relating to cases of contribution between joint tortfeasors is apparent from the remarks of the Court of Appeal in *Sigley* v. *Hale*, [1938] 2 K. B. 630. *Daniel* v. *Rickett, Cockerell & Co.*, [1938] 2 K. B. 322, was a case

where a pedestrian, in circumstances which were held not to constitute contributory negligence, was injured by stepping into a flap-hole giving access to a coal cellar. The flap had been removed, on the order of a representative of the occupier of the premises, by a coal-man delivering coal there. He had no assistant and was obliged to do all the work himself; he lifted the flap, walked six feet to his cart to fetch the coal, and so left the hole unguarded. He saw the plaintiff approaching with her umbrella in front of her, but he gave her no warning until he saw her falling. Both the coal-merchants and the occupier were held liable to her; the former for the negligence of their servant and the latter on the ground that he had directed the independent contractor's servant to do the very thing which created the danger in the highway. Hilbery, J., refused the claim of the occupier for a complete indemnity from the coal-merchants on the ground that it was not a case of pure vicarious liability; the occupier was liable for the authorisation given to the coal-man to open the flap. Acting on his judicial notice of what is customary when coal is being delivered to the ordinary London household, he considered that he would be reaching a just and equitable division of responsibility if he assessed that of the occupier at one-tenth and that of the merchants at nine-tenths. This appears to be hard on the occupier. It is of interest to note that this division of contribution was extended also to the costs both of the main action and of the third-party proceedings, but it is clear from his Lordship's discussion of the matter that the view taken on the question of contribution in respect of the damages will not automatically apply to the costs in all cases. From *Hopgood* v. *Willan and Others*, [1938] W. N. 107, it appears that where one only out of several defendants who were joint tortfeasors is appealing against a judgment against all the defendants, the proper procedure is to serve notice of the appeal on all, as the others would be interested in the order which might be made as to costs or as to contribution.

Death. The Law Reform Act, 1934. Survival of actions.

The judgments of Lawrence, J., and of the Court of Appeal in *Att.-Gen.* v. *Canter*, [1938] 2 K. B. 826; [1939] 1 All E. R. 18, possess a threefold interest. (1) On the general question of interpretation of the Law Reform (Miscellaneous Provisions) Act, 1934, the view expressed by Greene, M.R., that the avoidance of the operation of the *actio personalis* doctrine was not its sole object, is noteworthy.

He remarked that "it may be said to form a code in relation to the survival of causes of action for the benefit, or to the prejudice, of estates of deceased persons". (2) The two Courts decided in the affirmative a question, which Greene, M.R., suggested had not been present to the minds of the framers of the Act, whether the "all causes of action" which survive against the estate under section 1 (1) include claims for penalties by the Crown under the Income Tax Act, 1918, s. 30. It was common ground that this class of actions did not survive deaths prior to the 1934 Act. Whilst not unimpressed by the cumulative effect of the various matters urged by counsel for the exclusion of these penalties from the scope of the Act, the two Courts considered the generality of the term "all causes of action" to be too recalcitrant to admit of a construction which would exclude such claims for penalties, despite their quasi-criminal nature. To decide otherwise might open the flood-gate to exceptions. (3) A cause of action for such a penalty was held not to be one in tort—a question affecting the time limitation in section 1 (3) of the 1934 Act. The Court of Appeal had little to say on the matter. In the Court below, the Attorney-General had maintained that view by arguing that "the information is the King's action in debt . . . and not in tort", which is discussed in *Bullen and Leake*, 3rd ed., under the heading "Actions for Contract"; that the essential characteristic of a tort action is that it is for unliquidated damages; and that the civil liability which arises from a breach of a statutory duty is of a wholly different nature from a liability to a penalty for such a breach, which applies whether there has been damage caused or not. Lawrence, J., agreed that the action for penalties under section 30 of the 1918 Act, although based on deceit, is not an action in tort, but one for a debt created by statute.

Death. Damages.

The problem of the assessment of damages under the Law Reform Act, 1934, is still with us. The appeal in the rather unsatisfactory case of *Turbyfield* v. *G. W. Ry.*, reviewed in the *Annual Survey*, 1937, p. 178, was settled out of court: [1938] 2 All E. R. 261. In *Berridge* v. *Everard*, [1938] 1 All E. R. 717, the Court of Appeal said that a case involving consideration of the question whether a child was entitled to greater damages in respect of the loss of expectation of life than an adult, and whether the loss of enjoyment of life ought to be taken into consideration, was one involving

difficult questions of law which had not yet been decided, and that, therefore, it was undesirable that it should be remitted to a county court. In *Shepherd* v. *Hunter*, [1938] 2 All E. R. 587, the Court of Appeal itself held that an award of only £90 in respect of the loss of expectation of life of a child aged three was clearly wrong and that there must be a new trial. Slesser, L.J., remarked that he did not read Lord Wright's remarks in *Rose* v. *Ford*, [1937] A. C. 826, at p. 850, as suggesting that "because an infant is subject to certain greater risks, being in an uncared-for condition when young, than is an adult, that is to override the consideration of its expectation of life, notwithstanding those risks, by reason of the fact that the one great and supervening risk of old age, which ultimately accounts for the destruction of all men, is one which operates at that time in favour of the infant". On the other hand, the damages are not to be assessed merely by a mathematical consideration that an infant will live longer than an adult. His Lordship stressed that the locality of the abode of the infant is immaterial. "It may even be that this child would have ended its life in some very happy rural area, listening to nothing but farmyard sounds and smelling sweet odours"—and not in an industrial area of Lancashire. MacKinnon, L.J., had doubts whether the sum was so small that a new trial should be ordered, but he surrendered to the views of his colleagues.

In *Bailey* v. *Howard*, [1938] 4 All E. R. 827, the child killed was again a normal healthy one of three years of age and the appellants pleaded that an award of £1,000 was excessive. Counsel argued strongly that juries had arrived at a habit of awarding £1,000 damages in these cases and that the standard was illogical and wrong. He contended that the measure of damages should be lower where the claim survives in favour of the estate than where the injured plaintiff is alive. The Court of Appeal rejected this argument; its adoption would amount to flying in the face of the declared intention of the 1934 Act. Scott, L.J., said: "I see no means of arriving at any sort of quantitative scale for the guidance of Judge or juries except the gradual working out, chiefly through the common sense of juries, of the amounts that in English civilisation of to-day are regarded as reasonable for that particular head of damages. Whether any sort of scale will ultimately be worked out,

or whether the assessment will remain permanently quite empirical, one cannot say." To-day, the matter must be one for the appreciation of the jury, under the direction of the Judge, that the measure is the measure of the right that the deceased person possessed. The amount given must always be strictly reasonable, erring, if at all, on the small side. If the figure is neither hopelessly too large nor hopelessly too small, it will not be upset. MacKinnon, L.J., again confessed to a state of perplexity. On the £1,000 award, he "really had no view as to whether it was too much or too little, because he was perfectly incapable of forming any estimate as to what is the proper amount to be awarded in respect of the loss of expectation of life of a child of three years of age".

In *The Aizkarai Mendi*, [1988] P. 268, where the plaintiff's vessel had been sunk owing to the negligence of the defendants, the Registrar awarded a flat sum of £150 in respect of the loss of expectation of life and the pain and suffering to each of the representatives of the nine men drowned, whose ages varied from twenty-three to forty-four. The defendants objected to the awards made under the Fatal Accidents Acts as excessive, and Langton, J., agreed that that was so in four cases, but refused to disturb the awards because the authorities on the question of reviewing the quantum of damages precluded him from doing so even where the excess amounted to 20 per cent. or 25 per cent. The plaintiffs complained that the 1934 damages were inadequate and that the Registrar had proceeded on a wrong view of law in awarding the same amount in all cases despite the variations in ages. His Lordship agreed with the Registrar that the "joy of life" was the same in all these cases, but thought that that did not exhaust all the elements to be considered. "I cannot bring myself to believe that in any question of expectation of life the factor of age can be entirely negligible. . . . But the very notion of expectation seems to me to connote time, and, if the good which forms the subject of expectation is rated equal over a given number of cases, the time factor seems to me necessarily to assume importance. To apply this reasoning to the present case, if one assumes that the pleasure in existence derived by two men of different ages is equal, it appears to me to follow that, if both are in the same state of health and are following the same calling with the same kind of risk, the

expectation of life of the younger man must exceed that of his elder." His Lordship then embarked on a review of the awards under the Fatal Accidents Acts and the 1934 Act. He took as his standard the £1,000 awarded in *Rose* v. *Ford* in respect of the death of a girl of twenty-three. Without disturbing the amounts given under the Fatal Accidents Acts, he assessed the amounts under the 1934 Act, bearing in mind that some of the beneficiaries had been generously compensated under the former Acts, by classifying the nine claims with due regard to the time factor, which the Registrar had neglected. He divided the age groups into those over forty, over thirty, and over twenty, respectively. He "greatly reduced" the £1,000 standard of *Rose* v. *Ford* "upon the view that all the men were engaged upon a dangerous trade in comparison with the deceased girl in *Rose* v. *Ford*, and still further reduced it on the score that all likely participants of which we have any knowledge have been liberally compensated under the Fatal Accidents Acts". This left him with a standard figure of £400 for those over twenty; for those over thirty, £350; for those over forty, £300.

Branson, J.'s judgment in *May* v. *McAlpine*, 54 T. L. R. 850, is notable for its direction to the jury that they could award damages to the plaintiff executrix under the 1934 Act despite the fact that she had already accepted a sum paid into Court in respect of an action she had brought under the Fatal Accidents Acts on behalf of herself and her children. He directed the jury to assess the amount they would have given for loss of expectation of life and then to reduce it by the amount they considered fair in view of the compensation already paid in the previous action. He was careful to tell the jury that nothing had been heard in this case of legatees or creditors of the estate, the inference being that had the beneficiaries of the two sums awarded been different proper account of that fact would have to be taken in determining the effect of one payment upon the other. In previous issues of this *Survey* attention has been drawn to the fact that the practice adopted by the Judges in cases of duplication of damages might tend to work injustice against dependants if the estate were mortgaged or insolvent or if substantial parts of the 1934 damages went into the pockets of creditors or legatees other than the dependants. If the careful direction here given is generally followed, the danger will be lessened.

In *Ellis* v. *Raine*, [1939] 1 All E. R. 104, the Court of Appeal ordered a re-trial where the jury in an action where damages were claimed under the Fatal Accidents Acts and the 1934 Act awarded damages under the former head but none under the latter, despite the direction of the Judge that they should assess damages under both heads. The Court rejected, on the one hand, the attempt to resist a re-trial, and, on the other, to resist a re-trial on both heads, and it refused the invitation extended by counsel to explain the exact grounds for the assessment of the 1934 damages. Scott, L.J., designated the problem as "a social question turning upon the character of English society and the whole theory of politics of this country, and that being so . . . the jury is a much better guide than the Judges are". But he admitted that juries varied in their assessments and scales of values and that Parliament might have to intervene.

Finally, an *obiter dictum* by du Parcq, J., as he then was, in *Smith* v. *Cawdle Fen, Ely Commissioners*, [1938] 4 All E. R. 64, deserves a note. "If a man is killed by somebody's negligence on a Monday, and it is proved to the satisfaction of the jury that he had been sentenced to death and would have been hanged on Wednesday, I think that it is absurd to suppose that his executors would recover the same damages as if he had been a person with a likelihood of long life."

Conversion.

Solloway v. *McLaughlin*, [1938] A. C. 247, is notable for its statement of the duty of stockbrokers towards their clients, but for the purposes of this Section its importance lies in its discussion of the question of assessment of damages for conversion. Normally, the measure of damages for the conversion of shares would be measured by their value at the time of the conversion. Lord Atkin, in delivering the advice of the Judicial Committee, asked how the plaintiff's position is affected by the fact that, not knowing of the conversion, he receives from the wrongdoer, and retains, the very goods converted or their equivalent. "It appears to their Lordships that the only effect is that he must give credit for the value of what he has received at the time he received it, and that the damages are reduced by this amount. . . . It does not require argument to show that the amount by which the damages are reduced must be the value of the goods when returned. . . . It is objected that this will be to put [the plaintiff] in a better position than if he had not been defrauded at all, and this appears to have

influenced the decision of the majority of the Court of Appeal in Ontario. All that this amounts to is to recognise that fraudulent brokers have often sounder judgments than their clients as to the future course of the markets. If the shares had been converted and not returned, there can be no question that the client would have been entitled to receive the proceeds of the conversion though he himself had planned to hold and thought he had succeeded in holding the shares until a time when the value was nothing. Fortunately for the commercial community, the law has many effective forms of relief against dishonest agents, and no injustice is done if the principal benefits, as he occasionally may do, by the superior astuteness of an unjust steward in carrying out a fraud."

The advice of the Judicial Committee in *Mercantile Bank of India* v. *Central Bank of India*, [1938] A. C. 287, is of great importance in relation to the law of estoppel, but from the standpoint of this Section it need only be noted as a case which held that there was no conversion where the defendants had merely dealt with their own property as pledgees in the usual course of business which was well known to, and had been followed by, both parties.

The decision of the House of Lords in the much litigated case of *Caxton Publishing Co.* v. *Sutherland Publishing Co.*, [1938] 4 All E. R. 389, is of importance on the following points: (1) It holds that the remedies under sections 6 and 7 of the Copyright Act, 1911, the former for infringement of copyright and the latter for conversion, are not alternative but cumulative, but that in no case will the law allow any greater sum to be recovered than that representing the real damage suffered. The question of the methods to be adopted to prevent the overlap raises reminiscences of the trouble caused by the Fatal Accidents Acts and the Law Reform Act, 1934. (2) The limitation of action to three years after the infringement contained in section 10 of the Act was, with some hesitation on the part of Lord Porter, held to apply to actions for conversion under section 7 as well as to actions for infringement under section 6. (3) All the Courts concerned in this case had difficulty in deciding which of several acts constituted the real act of conversion; was it the order given to bind up the sheets which contained the infringing matter, or the binding-up of those sheets, or the sale of the volumes containing the sheets, or the delivery to the purchasers?

The House of Lords unanimously agreed that the moment when the defendants did an act unequivocably amounting to a denial of the plaintiffs' right was when they started on the stitching and binding of the sheets with sheets of their own. The parts of the judgments dealing with this point are well worthy of perusal for their discussion of the general nature of conversion. (4) The discussion of the question of assessment of damages for conversion is most interesting, but it is too lengthy to admit of detailed exposition in this *Survey*. All their Lordships agreed that the general rule is that the measure generally is the value of the thing converted at the date of conversion, but the difficulty arises in applying that rule to varying, and, occasionally, highly artificial, conditions. Lord Porter specifically left open the question whether the view of Abbott, C.J., in *Greening* v. *Wilkinson* (1825), 1 C. & P. 625, 626, that the jury may give the value at the date of conversion or at any subsequent time, can be supported. He rejected the contention that the words "to the owner" should be added to the words "the value of the thing converted"; he considered that that would be inaccurate and likely to lead to confusion of thought. The general rule which seems to comprise the sum and substance of their Lordships' discussions of the matter seems to be that the plaintiffs were entitled "to a just sum by way of indemnity to represent their loss by reason of the wrong done to them". The following are some of the statements made on the subject. The sum is not that "which the owner will make out of the thing in money if it is not taken away from him".* There may be cases where the owner does not use the thing at all or does not use it for money gain. It is wrong to state that "an article has no value, or a diminished value, to the owner because he has no machinery for selling it. . . . It is the value, known or unknown, which has to be paid, and that value is not necessarily the price which the owner could have obtained or would have taken." "One of a variety of tests may be the best available test according to the circumstances." The test which recommended itself to most of their Lordships in this case was that put forward by Lord Porter. The defendants had published the volumes with the infringing matter belonging to the plaintiffs; neither party had considered at what price it could have been bought or sold before the publication; the fair value had to be considered in the context of publication and sale. Generally,

a fair calculation would be to take the share of the selling price of the volume corresponding to the proportion which the converted material bore to the whole volume and to multiply that sum by the number of copies sold, then to reduce that figure by the costs relating to the converted part before publication and to reduce it by the proportional share of the costs of selling after publication, provided the defendants could establish that those costs were necessarily incurred in selling volumes sold and not otherwise.

Defamation.

The contractual aspects of *Groom* v. *Crocker*, [1939] 1 K. B. 194, have been discussed elsewhere. Here it need only be noted that the judgment of Hawke, J.—see the *Annual Survey*, 1937, p. 187—was affirmed on the issue of libel. His Lordship had held that the qualified privilege of the solicitors had been defeated by the indirect motive of "disregarding the interests of one client because it suited them better to regard the interests of another client". The Court of Appeal unanimously agreed with this view, though all their Lordships expressed doubt whether the occasion could be said to be privileged at all. "The privilege alleged was that the appellants in writing the letter were acting as the solicitors duly authorised to conduct the defence; but if, as I have already held, they were not so authorised, the very foundation of the defence of privilege disappears" (*per* Scott, L.J.).

Is a letter written by an employer in response to a request from a labour exchange for certain information relating to a late employee written on an absolutely privileged occasion? Hawke, J., in *Mason* v. *Brewis Bros., Ltd.*, [1938] 2 All E. R. 420, could not hold that anything enacted in the Unemployment Insurance Acts, 1930 and 1935, was intended to, or did, change the law as it was laid down in *Collins* v. *Henry Whiteway*, [1927] 2 K. B. 378, to the effect that such statements made to an administrative tribunal, albeit one which "acts judicially in the sense that its proceedings are conducted with the fairness and impartiality which characterise the proceedings of a Court of justice", are, at the most, only covered by a qualified privilege. His Lordship himself suggested the desirability of an appeal from his decision.

Negligence. The standard of care.

Of what might be termed the "plain negligence" cases of the year, the decision in *The Saint Angus*, [1938] P. 225, was about the most noteworthy. The defendant ship was manned by seven hands; the master and mate took four-hour

watches on and off in turn on the bridge and two A.B.s took similar turns at the wheel. The other three members of the crew consisted of two engineers and a spare hand. Shortly before the collision, the A.B. at the wheel handed it over to the master and left the bridge to attend to the galley fire. Almost immediately after, the master, who previously had been feeling quite well, fainted owing to the after-effects of food poisoning. In these circumstances, the defendants pleaded that the ensuing collision happened without their negligence. In a considered judgment, Hodson, J., held that, whilst he was not prepared to lay down that at all times it is necessary to maintain the position of a helmsman at the wheel and the navigating officer on the bridge in this class of ship, yet in the circumstances of the case, with the ship not at sea but proceeding in narrow and dangerous waters, the position should have been maintained to the extent of having a hand on deck in addition to the officer on the bridge.

Phillips v. *Whiteley*, 54 T. L. R. 879, deserves notice for Goddard, J.'s judgment, which held that a jeweller who undertakes to pierce a customer's ear for ear-rings is not bound to maintain the same standard of care and skill that a doctor might use. "If a person wants to ensure that the operation . . . is going to be carried out with that proportion of skill and so forth that a Fellow of the Royal College of Surgeons would use, she must go to a surgeon. If she goes to a jeweller, she must expect that he will carry it out in the way that one would expect a jeweller to carry it out. One would expect that he would wash his instruments. One would expect that he would take some means of disinfecting his instrument, just in the same way as one knows that the ordinary layman, when he is going to prick a blister or prick a little gathering on his finger, generally takes the precaution to put the needle in the flame." In any case, his Lordship found that the *per quod* allegation was not proved in this case.

The extent of the duty; burden of proof.

Donoghue v. *Stevenson*, [1932] A. C. 562, was again much in evidence. One of the moot points about the line of cases founded upon it is the question of the nature of the burden of proof cast upon the plaintiff. Is the *res ipsa loquitur* doctrine applicable here? Not much light is derivable on this point from the judgment of Lewis, J., in *Daniels* v. *White & Sons, Ltd., and Tarbard*, [1938] 4 All E. R. 258, where a husband and wife sued the manufacturers

in tort, and the husband sued the retailer in contract, in respect of injuries received through drinking the contents of a bottle of lemonade, which were found to have been mixed with carbolic acid. The bottle reached the consumers in the state in which it left the manufacturers with the paper over the cork intact. All that the plaintiffs could do was to state a *res ipsa loquitur* plea: "We have been injured by drinking this dangerous mixture; we cannot tell how the acid got into the bottle but the clear inference from the circumstances is that it got there through your negligence." His Lordship avoided the difficulty of deciding whether the *res ipsa* doctrine applied by allowing the case to proceed to the point of defence and then finding that the defendants had sufficiently rebutted the inference of negligence. They described their process for washing bottles as "fool-proof", and his Lordship, apparently, accepted that description as correct. "The only way in which it might be said that the fool-proof machine was not sufficient was if it could be shown that the people who were working it were so incompetent that they did not give the fool-proof machine a chance." His Lordship was satisfied that the supervision was adequate. "I have to remember that the duty owed to the consumer, or the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury." He thought that that duty had been discharged. With respect, the judgment is most unsatisfactory, and for the following reasons: (1) His Lordship should have faced the issue of the applicability of the *res ipsa* doctrine. He did not do so and his references to the authorities on the matter in the *Snail Case* line of cases were inadequate. If the doctrine does apply, this seemed to be a clear case for its application. The occurrence was unexplained; it was not likely to happen in the ordinary course of things without negligence on the part of someone; the circumstances pointed to that someone being the manufacturers and not any other persons. (2) It is extremely dubious whether the evidence adduced by the defendants was sufficient to rebut the inference of negligence and to re-cast the burden of proof on the plaintiffs. Did they "show a way in which the accident may have occurred without

negligence on their part or on the part of those for whom they were responsible"? The clear deduction from the evidence is that they did not. Admitting that the system of washing the bottles was not a negligent one either in its technique or in its supervision, what reasonable alternative explanation did the defendants adduce that the presence of the acid in the bottle was not due to the negligence of one of their servants—for whom they were responsible—in working the so-called fool-proof system? The test of sufficiency of counter-proof enunciated in *The Kite*, [1933] P. 154, and other similar cases, was not satisfied. On the contract issue, his Lordship found that the retailer was not liable under the Sale of Goods Act, s. 14 (1), in the absence of reliance by the purchaser on her skill and judgment; but she was found liable under section 14 (2) on the ground that the goods were sold by description and that the implied warranty of merchantable quality had been broken.

Paine v. *Colne Valley Electricity Supply Co. and British Insulated Cables, Ltd.*, [1938] 4 All E. R. 803, is a more straightforward decision whereby the first defendants were held liable to the widow of an employee for breach of a statutory duty and of the common law duty, as established in *Wilsons and Clyde Coal Co.* v. *English*, [1938] A. C. 57, of providing safe equipment and premises for their employees, and the second defendants, the manufacturers of the dangerous equipment, were held not liable under the principle of the *Snail Case* on the ground of intermediate opportunity of examination. The notable point of the case bears on the division of opinion, exemplified last year in the judgments in *Kubasch* v. *Hollands*, 58 T. L. R. 1024, and *Dransfield* v. *British Insulated Cables*, 54 T. L. R. 11, whether the intermediate break in the chain of causation should be a reasonable possibility or probability of examination. Goddard, L.J., sitting as an additional Judge, inclined to the latter view. Referring to Lord Atkin's views in the *Snail Case* at p. 578, he said: "It seems clear that, in speaking of the prevention, or of the reasonable possibility, of examination, Lord Atkin meant prevention or no possibility in a business sense. A person who buys 100 cases of tinned salmon from the packers has a physical opportunity of examining each tin. Commercially speaking, it would be impossible for him to do so, nor would anyone expect it, as by opening the tins he would spoil the contents before

they could be sold. Perhaps, therefore, without disrespect, the word 'probability' may be substituted for 'possibility'. . . . Some day, perhaps, it may be held that, if a man negligently constructs or compounds something which he knows the employees or customers of his customer must use, he will not be allowed to rely on the fact that his customer ought to have examined the goods and did not do so. I do not think, however, that I have any right so to hold. . . ."

In *Sharpe* v. *Avery*, [1938] 4 All E. R. 85, the plaintiff, a pillion-rider on a third party's motor cycle, sued the defendant, who, being familiar with the road, had agreed to lead them on his cycle. At a left-hand bend he drove straight ahead off the road on to a waste piece of land and applied his brakes hard thereon. The third party followed and collided with him, whereby the plaintiff was injured. The Court of Appeal unanimously agreed that there was a duty of care owed by the defendant to the plaintiff; he had invited the third party to place reliance upon his skill and knowledge of the road and the third party had relied upon his representation. Slesser, L.J., invoked the *Snail Case* to establish the duty as between the defendant and the plaintiff; the former when he assumed the role of guide knew that the third party as well as the plaintiff pillion-rider depended on his representation. The conduct of the third party in following on to the waste land was not a *novus actus interveniens*. The case was one of continuing negligence on the part of the defendant and, possibly, of contributory negligence on the part of the third party, but there could be no identification of the pillion-rider with the driver of his cycle. The negligence of the defendant consisted in his going on to the verge at all, and, having gone on it, in suddenly braking hard without taking precautions that the man behind should not run into him.

Traffic cases.

The question of negligence in relation to traffic regulations has been much to the fore again in 1938. Some of the cases present little difficulty and can be summarised very shortly. Thus, in *Hunter* v. *Wright*, [1938] 2 All E. R. 621, the defendant's car skidded without her fault, mounted the pavement and injured the pedestrian plaintiff thereon. The alleged negligence was that she failed to take the right steps to correct the skid and that she accelerated after the skid had started. The Court of Appeal affirmed the decision of Lewis, J., that the defendant could not have been said to

be negligent as she had only about two-fifths of a second in which anything might be done to correct the skid; it was not proved that anything she did had an effect on what happened or that anything which she could have done would have prevented the accident. She had neither the time nor the space in which to correct the skid. Slesser, L.J., referred, with approval, to the *res ipsa loquitur* doctrine as applied in *Ellor* v. *Selfridge* (1930), 46 T. L. R. 236, and, incidentally, referred to the skid as "one may say, an act of God". The report of the case is not sufficient in its references to the state of the road, the traffic upon it, and other similar matters, to enable one to say that the facts were as in *Ellor* v. *Selfridge*.

The main point of interest in *Ward* v. *L.C.C.*, [1938] 2 All E. R. 341, is that a fire-engine is entitled to no greater privileges than any other vehicle at crossings controlled by lights. The plaintiff, driving on his own side of the road and in accordance with the directions of the lights, was held not bound to give way to a fire-engine. "If the red light turns to green, and there are other vehicles crossing your bows at the time, or if pedestrians are taking advantage of the red lights to cross the road, and have not got to the other side, you have no business to move forward directly the green appears, to the danger of any pedestrian or any vehicle passing across the road perfectly lawfully in front of you, but not quite out of your way. . . . I do not believe that it means that every driver who comes to a green light has practically to stop, and to peer up to the right and then right down to the left, because that means that you are assuming that every driver is likely to disobey the absolute prohibition of the red light while the other light is green in your favour": Charles, J.

The decision of the Court of Appeal in *Joseph Eva, Ltd.* v. *Reeves*, [1938] 2 K. B. 393, stressed this latter point; the driver of a vehicle entering a cross-roads with the lights in his favour is under no duty to assume that the driver of another vehicle may be entering the cross-roads with the lights against him. The driver in this case entered with the lights in his favour and accelerated to pass parallel traffic on his left which blocked his view to the left until it was too late to avoid a collision with a vehicle which had entered the cross-roads from the left with the red lights against it. The Court unanimously held that this was not contributory

negligence on the part of the driver acting lawfully. The provisions of the Highway Code must be read in the light of the relevant Traffic Regulations, and, in that light, the driver was innocent of negligence.

In the *Annual Survey*, 1937, p. 177, attention was drawn to the judgments of the Court of Appeal in *Bailey* v. *Geddes*, [1938] 1 K. B. 156. In *Chisholm* v. *London Passenger Transport Board*, 54 T. L. R. 773; 55 T. L. R. 284, the same Court went as nearly to reversing its own decision as it possibly could. The way was paved for it by the judgment of Wrottesley, J., in *Knight* v. *Sampson*, 54 T. L. R. 974, which dealt mainly with the question of negligence and not that of contributory negligence. But it is clear that his Lordship gave a limited application to *Bailey* v. *Geddes*. He found that the defendant's car had its wheels "either on or within a foot or two" of the crossing when the plaintiff stepped on to the crossing in front of the car. He thought the driver was not guilty of negligence and he was clearly prepared to hold that, if she were guilty, the plaintiff would be debarred from recovery on the ground of contributory negligence. It is impracticable to give the space in this *Survey* to a full exposition of the facts of *Chisholm's Case* or to review the statements made therein on the interpretation of the Pedestrian Crossing Places (Traffic) Regulations, 1935, regs. 3 and 5, and attention must be limited to the views expressed on the possibility of contributory negligence on the part of a pedestrian who has stepped on to a crossing before an approaching vehicle has reached it. The views of the trial Judge, Hilbery, J., and of du Parcq, L.J., who supported him in a vigorous dissenting judgment in the Court of Appeal, may be collectively summed up as follows for the purposes of giving a clear-cut picture of the division of opinion in the case. (1) The plaintiff was on the crossing before the defendants' vehicle had reached it. (2) The driver was guilty of negligence by reason of not keeping a good look-out which would have enabled him, if he was going at a proper speed, to avoid the accident. He was guilty of a breach of Regulation 3, which says that a driver of a vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able to stop before reaching such crossing. In *Bailey* v. *Geddes* the driver broke the regulation by moving on to the crossing when, owing to an obstruction, he could

not see that it was clear of pedestrians; the driver here went on to the crossing when he could not see that it was clear because he was not keeping a proper look-out; that was not a fundamental distinction between the two cases. (3) In view of the foregoing, *Bailey* v. *Geddes* constrained the learned Lord Justice, just as much as it did Hilbery, J., to hold that as a matter of law the plaintiff could not be guilty of contributory negligence. The plaintiff in the earlier case would have been guilty of such negligence but for the view which the Court of Appeal took of the regulations. *Knight* v. *Sampson* could have been equally, or better, decided in favour of the defendant by saying that *Bailey* v. *Geddes* did not apply to it owing to the failure of the plaintiff satisfactorily to prove that the defendant's car had not reached the crossing when he stepped upon it. (4) Even if the plaintiff could in law be guilty of contributory negligence, which their Lordships denied, the defendants had failed to prove that he was so guilty. He was entitled to go on the crossing and to expect that an approaching vehicle would abide by the traffic regulations. Even if he was guilty of negligence, the last opportunity rule would still operate to render the defendants liable. The views of the majority (Scott and MacKinnon, L.JJ.) may be summarised as follows. (1) The judgment of Hilbery, J., must rest on one of two grounds: (i) that *Bailey* v. *Geddes* compelled him to hold that, if the plaintiff was once actually on the crossing, the defendant was bound somehow to pull up his vehicle so as to avoid him, however near it had got to the crossing at the moment the plaintiff stepped on to it; or (ii) that if he was not so compelled to construe the regulations, the defendant was still sufficiently far away from the crossing when the plaintiff stepped on to it to give him reasonable time to pull up. It also rested on the view that the plaintiff could not be guilty of contributory negligence in stepping on to the crossing as and when he did. (2) On (ii), they held that the plaintiff stepped on to the crossing when the vehicle was too near to stop; the driver was proceeding at a proper speed and keeping a good look-out. In *Bailey* v. *Geddes*, the plaintiff had walked about fifty feet on the crossing before he was struck down and, therefore, must have stepped on to it well before the vehicle approached anywhere near it. That case applied only to similar facts. (3) Their Lordships, on (i), were clearly of the opinion that Regula-

tions 8 and 5 did not apply to this case. But if Regulation 8 did apply, it is clear from MacKinnon, L.J.'s judgment that he thought that it had been complied with. A driver approaching a crossing is not bound, to escape liability, to slow down more and more so that "if, when he is 1 ft. from the crossing, some fool steps into the road ahead of him, he can pull up his car in less than 1 ft.": MacKinnon, L.J. That would involve "a duty upon every car to slow down almost to a walking pace at every pedestrian crossing, and this would reduce the flow of traffic in a busy town almost to an absurdity": Scott, L.J. (4) Consequently, the plaintiff could be, and was, guilty of contributory negligence. *Bailey* v. *Geddes* "did not attempt to define the duty of a pedestrian in regard to embarking from the footway on to a crossing" (!). He is entitled to assume that approaching traffic is acting, and will continue to act, so as to be able to comply with the directions of (applicable ?) regulations, and that, if an approaching vehicle is far enough away for it "conveniently" to check its speed, he is entitled to cross. But he has no right, even if willing to risk his own life, to embarrass a driver driving at reasonable speed. If he does so, he will be guilty of contributory negligence. In a little homily to motorists about the courtesy of not keeping pedestrians too long on the pavement waiting for a stream of cars to pass, Scott, L.J., came pretty near to contradicting himself, but saved himself by saying that they must reduce speed so as to be able to pull up if a pedestrian steps from the pavement when the car "is still a reasonable distance away". Two short comments may suffice on the case. The first is that, despite what the majority Lords Justices said of it, *Bailey* v. *Geddes* did very definitely create the impression which Hilbery, J., and du Parcq, L.J., had of it. Whether it was a desirable decision is a debatable matter. The second is that it seems foolish to tell pedestrians that they may assume that approaching drivers will adhere to the relevant regulations when the Courts of law are still unable to agree amongst themselves what regulations are applicable to what crossings, or what exact duties the regulations impose when they are applicable.

In connection with the traffic cases, it may be well to note *Carpenter* v. *Ebblewhite*, [1938] W. N. 333, where the plaintiffs had been injured by a car driven by the defendant X. It was in dispute whether the defendant Y had sold the

car to X or whether X was driving as Y's agent. The plaintiffs, by leave, added Y's insurance company as a defendant and in their statement of claim asked for a declaration that the company was liable to satisfy any judgment obtained against X or Y. The Court of Appeal unanimously agreed that that part of the statement of claim which referred to the company should be struck out as vexatious and frivolous. No dispute had yet arisen between the plaintiffs and the company and it was premature and wrong to determine a dispute which had not yet arisen: Greer, L.J. Slesser, L.J., was not wholly prepared to agree to this proposition that a separate action claiming the declaration might not lie; he took the view that to allow this part of the statement of claim to stand would embarrass the fair trial of the original action. In his view the old practice prevailing before the Road Traffic Act, 1934, whereby a jury should not be told that a defendant motorist is insured, still applied. MacKinnon, L.J., thought that a claim for declaration of future liability was only appropriate on a question of law. Some questions of fact might be involved in such a decision on law, but in the instant case the question was one entirely of fact and a declaration of liability, consequently, was inappropriate in it.

Negligence and nervous shock.

The Court of Appeal in *Owens* v. *Liverpool Corporation*, [1938] 4 All E. R. 727, had to decide the interesting point whether damages could be given to the relatives of a deceased person attending his funeral who suffered shocks of varying intensities by the sight of a collision between the hearse carrying the coffin and a tramcar negligently driven by the servants of the defendant corporation. The trial Judge had dismissed the claims on the ground that there was no apprehension, or actual sight, of injury to a human being. MacKinnon, L.J., delivering the judgment of the Court, after a reference to the main decisions on the subject of nervous shock as a ground for damages, thought that on principle recovery cannot be limited to cases of apprehension of risk to human safety, but the fact that shock follows an apprehension of danger to a less important matter may well be material in considering whether the allegation be proved. The possible success of unrighteous actions should not bar redress in meritorious cases. Here, where the shock was due to the imperilment of the coffin, " it may well be that the plaintiffs are of that class which is peculiarly susceptible to the luxury of woe at a funeral, and may be disastrously disturbed by

any untoward accident to the trappings of mourning. Nevertheless, one who is guilty of negligence to another must put up with the idiosyncrasies of his victim that increase the likelihood or extent of damage to him. It is no answer to a claim for a fractured skull that its owner had an unusually fragile one". The defendants were held liable, but they were given conditional leave to appeal to the House of Lords. The judgment is clearly right in principle. As *Beven on Negligence* (4th ed., p. 66) puts it: "The objection goes rather to the proof of the injuries than to the legal appraisement of damages in respect of them when proved. Medical science can deal with them as it is constantly doing with alleged nervous affections arising in railway collision cases. A safeguard against imposition seems to be to bear steadily in view the elementary rule that before a plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act—the onus is on him and the absence of objective symptoms is a circumstance of suspicion." This decision undoubtedly extends the law, which had hitherto gone to its extreme limit in *Hambrook* v. *Stokes*, [1925] 1 K. B. 141, where the shock was to a mother apprehending danger to her child. Atkin, L.J., as he then was, had there intimated his approval of the extension of the protection to bystanders. This case does not quite go that length, but it does widen the class of relatives who come within the rule; here they were a mother, an uncle, a cousin, and a cousin's husband. It also extends the range of the objects of apprehension from living human beings to the remains of human beings. MacKinnon, L.J.'s reference to apprehension of damage to a pet dog opens a vista of further developments which raises a query whether some bastard species of *volenti* should not be conceived to protect the law from sinking into a state of absurdity. The next stage of development may well be to extend the law to cover apprehension of damage to valuable property—a case of a modern Elgin suffering the sight of a collision with the ship bearing his marbles! It may be well to note that in *Currie* v. *Wardrop*, [1927] S. C. 538, the relationship was not that of relatives but of lovers, and recovery was there allowed. Under the Workmen's Compensation Acts shock resulting from the sight of an accident to a fellow-workman has been held to be a ground for compensation: *Yates* v. *S. Kirby Collieries*, [1910] 2 K. B. 538. As Professor Winfield suggests in his *Law of*

Tort, p. 87, it is not improbable that one limitation upon these actions will be the adoption of the view that no legal duty is owed towards unreasonably nervous people.

Dangerous premises.

A number of the cases dealing with dangerous premises are considered under the subject of breaches of statutory duties. Amongst the "straight" cases may be mentioned *Howard* v. *Farmer*, [1938] 2 All E. R. 296, where it was held that an employee of sub-contractors X, who had been injured by stepping into a void in uncompleted stairs being put in by sub-contractors Y, could not recover damages from the general contractors Z, who had provided a ladder from the ground to the second floor, but none from the ground to the first floor. The staircase was obviously incomplete; the lack of a ladder from the ground to the first floor was not an invitation to use the uncompleted staircase; the sub-contractors Y had no power to invite or license persons to use the incomplete staircase; the accident was due to the plaintiff's own lack of care.

In *Nabarro* v. *Frederick Cope, Ltd.*, [1938] 4 All E. R. 565, du Parcq, L.J., sitting as an additional Judge, held that an owner of premises who has handed them over to builders to build a house thereon for him has no general right to come upon the premises whenever he wills and that, certainly, there is no duty upon the builder to have the premises at all times ready and safe for a visit by him. Certain circumstances may raise an implication of an invitation or licence, but they did not exist in this case.

In *Simons* v. *Winslade*, 159 L. T. 408, a customer at a public-house, crossing the yard thereof to get to a convenience, slipped on some vomit and was injured. It was dusk and the yard was not lit. The publican had inspected the yard three hours earlier and had cleaned it. In the two previous years only one other customer had vomited in the yard. The Court of Appeal agreed that the customer was still an invitee in the yard, but that the publican could not reasonably be expected to guard against such a danger and that he had not failed in his duty to his invitee.

In *Pitt* v. *Jackson*, [1939] 1 All E. R. 129, the plaintiff, a sister-in-law of the defendant, in passing along a passage in his house, slipped upon some polished linoleum which she had observed to be polished but did not think to be slippery. It was agreed that she was a licensee. She relied on the

well-known decision in *Weigall* v. *Westminster Hospital*, 52 T. L. R. 301. Croom-Johnson, J., considered that there had been no failure of duty and that the linoleum was not a trap, which must be "something unexpected in the particular danger encountered, something which a reasonable man would neither expect nor suspect and something which there was nothing to indicate to the person who was going there that he ought to be on his guard". He found difficulty in holding that the linoleum was so highly polished as to constitute a trap, polished to the "high degree" proved in the earlier case. To infer every time that one has polished linoleum in a house and somebody slips on it that it was polished to that degree necessary for liability "would indeed be adding to housewives a burden in addition to all those burdens which they already have to bear under our modern conditions of civilisation".

Onesimus Dorey & Sons v. *Headley's Wharf, Ltd. and William Ashby, Ltd.*, [1938] 4 All E. R. 680, which may go on appeal, is mainly of importance as laying down the rule that the owner of a wharf on the bank of a navigable river does not invite all and sundry to berth their ships alongside without previous arrangement. *The Moorcock* (1889), 14 P. D. 64, was held inapplicable as there was a contractual relationship in that case, and Branson, J., considered that the existence of such a relationship must also have been the basis for the decision in *The Bearn*, [1906] P. 48, unless it could be explained as a case of invitation raising an implied contract.

Breaches of statutory duties.

The number of cases involving claims for breaches of statutory duties seems to be increasing year after year. This year there was a very substantial number of such cases, some of them of considerable importance and many of them involving difficult questions of statutory interpretation—questions which also arose in cases dealt with under other heads in this Section. The contractual aspects of *Read* v. *Croydon Corporation*, 55 T. L. R. 212, have been discussed elsewhere. In tort, the claims were based on negligence, breach of statutory duty and nuisance, but the latter head seems to have been abandoned at an early stage. In Stable, J.'s judgment, two points arose for consideration under the second claim, the category of persons to whom the statutory duty was owed, and the scope of the duty itself under the Waterworks Clauses Act, 1847, s. 35. On

the construction of the Act, he held that the duty was owed to the occupiers, the water-rate payers, which meant, in this case, that the father had a claim but that the infant plaintiff was excluded from a remedy under this head. On the scope of the statutory duty, his Lordship, not without cause, complained of the difficulties of extracting principles from the authorities and of reaching a demarcation between one category of duty and another. The varying categories may exist not only in different statutes but in different sections of the one and the same statute. Here, he construed the duty to be one not of an absolute obligation to ensure safety but of a duty to take all reasonable care and skill to ensure that the water supplied should accord with the requirements of the Act. He found that the high standard of care required in a matter so vital to public health had not been maintained. As the infant plaintiff could not recover under this head, it became necessary to consider whether the statutory remedy was exclusive of the remedy for common law negligence. On this point his Lordship again referred to the difficulties of extracting principles from the authorities. Relying mainly on the remarks of Atkin, L.J., as he then was, in *Phillips* v. *Britannia Laundry*, [1923] 2 K. B. 832, his Lordship felt compelled to hold, on the authorities and in the circumstances of the section here in question, that the statutory remedy provided by it did not exclude other remedies, though the case might be different in other sections of the Act. "The fallacy underlying this part of the argument put forward on behalf of the corporation arises . . . from the proposition that, because the statutory duty was identical with, or wider than, the common law duty, it was either necessarily the same as, or extinguished, the common law duty. The scope of the two duties may have been identical, or the scope of the statutory duty may have been wider than that of the common law duty, but the class of persons to whom they were respectively owed was different and their origin was different." From the common law negligence standpoint, he considered this case to be stronger than the *Snail Case* itself, and that the infant plaintiff could state a good cause of action without mentioning the statute. The infant plaintiff consequently recovered at common law. The questions of statutory interpretation discussed by his Lordship deserve a much more extensive description than has been given here, but anything like an adequate review of

them would involve an embarkation on a voyage for which the draught of the *Annual Survey* is not sufficient.

Barnes v. *Irwell Valley Water Board*, 54 T. L. R. 815, raised some similar questions. The plaintiffs were injured by lead-poisoning contracted by drinking water supplied for domestic purposes by the defendants. The water was pure so long as it was in iron pipes, but in its passage through six feet of lead-piping before the stop-cock was reached, and its further passage through lead-piping on the plaintiffs' premises, which had been inspected on behalf of the defendants, it dissolved the lead and became poisonous. Mr. Commissioner Henn Collins, as he then was, and the Court of Appeal, held that there had been no breach of the relevant statutory duty as the water was pure and wholesome up to the stop-cock. Had there been a breach of duty, the occupier, as the person bound in law to pay the water-rates, would have been within the protected category (see Greer, L.J.'s judgment on this point). In view of the remarks in the Section on the Law of Contract on the judgment in the *Croydon Case*, it is noteworthy that none of their Lordships suggested that the relationship between the male plaintiff here and the defendants would not have been a contractual one if it had been proved that he actually paid the water-rate; Slesser, L.J.'s judgment is particularly apposite in this context. But in the absence of proof of such a relationship, the Court held that there was a common law duty owed by the defendants to the plaintiffs; the trial Judge may have relied too much on *Heaven* v. *Pender* (1883), 11 Q. B. D. 503, but his decision was correct in view of the applicability of the principle of the *Snail Case*. The defendants knew of the plumbo-solvency of the water; they knew of the lead-piping on the premises; they knew of the danger; they took no steps to reduce the plumbo-solvency; they issued no warning to consumers. A similar argument to that advanced in the *Croydon Case* on the question of the exclusive character of the statutory remedy met with no better fate here; Slesser, L.J., expressly remarked that a duty at common law is not necessarily at an end when a statutory obligation has been satisfied.

In *Square* v. *Model Farm Dairies (Bournemouth), Ltd.*, 54 T. L. R. 821; [1939] 1 All E. R. 259, damages were claimed in a consolidated action by the plaintiff and various members of his family in respect of illnesses contracted

through drinking milk supplied by the defendants and containing typhoid germs. The plaintiff had been invited to deal with the defendants by a brochure describing the defendants' methods and stating that the milk was mainly produced on their own farm. In fact, during the summer season the greater part of their supplies was drawn from other farms. Lewis, J., and the Court of Appeal, held that the claim in negligence failed. The defendants did not appeal against the verdict given in favour of the plaintiff purchaser for breach of warranty. The two issues which gave trouble were the claims for damages for fraud and for a breach of statutory duty. The two Courts held that the former failed as there was no evidence that the defendants did not honestly believe in what they represented. The claim for breach of statutory duty, under which alone the other members of the family could succeed, was based on the Food and Drugs (Adulteration) Act, 1928, s. 2, which enacts that "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, or not of the substance, or not of the quality, of the article demanded by the purchaser." Lewis, J., accepted the view that a civil action for damages could lie on this provision and was not excluded by the fact that the Sale of Goods Act, s. 14, protected the purchaser so that there was no need to imply an intention on the part of the Legislature in 1928 to protect the purchaser and others by the creation of a new cause of action. His Lordship's argument was that under the Sale of Goods Act there was the difficulty of proving that the purchaser had made known to the seller the particular purpose for which the goods were required so as to show that he was relying on the seller's skill and judgment; there was no such requirement in the 1928 Act. Consequently, he considered that the two causes of action were not the same and the latter was not precluded by the former. He also rejected the view that the 1928 Act could only protect the purchaser; anyone who had been prejudiced by the sale in contravention of the 1928 Act could recover. Relying on the criminal law, his Lordship considered that there had been a breach of the 1928 Act and, therefore, awarded damages to the members of the family as well as to the plaintiff purchaser. The Court of Appeal unanimously reversed his decision on the statutory breach head. They could not construe the 1928 Act to mean that there should be a remedy other than the penalty provided for

in the Act. Lewis, J., they considered to have fallen into error by accepting as the final test the question whether the proof was the same or different under the Sale of Goods Act and the 1928 Act. They must look at the "general purview" of the two Acts and that disclosed the fact that the Act of 1928 deals substantially with the same cases as would arise under the Sale of Goods Act, ss. 13 and 14. Examining the 1928 Act, their Lordships found it impossible to think that its intention was that a civil remedy should be provided for a breach of it when the Act itself in substance is imposing a penalty for that for which a civil remedy already existed at common law and under the Sale of Goods Act. In any case, even assuming that an action did lie on the 1928 Act, on no view could it be said that anyone except the purchaser came within its protection. As du Parcq, L.J., said, it was impossible to believe that the 1928 Act intended to give third-party rights to strangers to the contract. The Court did not decide whether, in fact, a breach of the Act had taken place as that was unnecessary.

Gillett v. *Kent Rivers Catchment Board*, [1938] 4 All E. R. 810, is mainly of interest for the view of Stable, J., that, if it had been necessary to do so, he would have been compelled to hold that the Land Drainage Act, 1930, did not impose a duty on a drainage board in relation to farmers who live inside its area so as to create a right of action at the suit of those farmers if the duty is not discharged. This view was supported by the earlier decision of du Parcq, J., as he then was, in *Smith* v. *Cawdle Fen, Ely Commissioners*, [1938] 4 All E. R. 64. The negligent performance of authorised acts under this and similar Acts may raise a cause of action; the non-performance of permissive acts raises no such cause of action, and "non-performance" may include an inadequate exercise of powers.

The decision of the Court of Appeal, affirming the judgment of Tucker, J., in *Lewis* v. *Denye*, [1939] 1 All E. R. 310, is notable for its re-statement of the present position of the law on the question of the applicability of the defence of contributory negligence in actions for breaches of statutory duties. du Parcq, L.J., summarised the matter as follows. (1) Contributory negligence is a defence; only the House of Lords can now decide otherwise. (2) Contributory negligence in this context bears the same meaning as it does in an ordinary action at common law, *i.e.*, that

the plaintiff failed to take ordinary care for his own safety and that this failure was a contributory cause of the accident. This point is of importance because of the remarks of Lord Wright in *Flower* v. *Ebbw Vale Steel Co.*, [1932] 2 K. B. 132, which have been frequently referred to as establishing that there must be a higher standard of care applied to a workman where contributory negligence is pleaded against him in these statutory duty actions. Both the Court of Appeal in this instant case and Greer, L.J., in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1938] 3 All E. R. 21, have indicated their dissent from this proposition. In view of the decision of the Court of Appeal in *Craze* v. *Meyer-Dumore Bottlers' Equipment Co.*, [1936] 2 All E. R. 1150, it is only the House of Lords which can now say that "contributory negligence" does not bear its ordinary meaning in these actions. (3) Where a statutory regulation is, on the face of it, directed to ensure the safety of the workman, and its infringement is likely to increase the risk of his occupation, any act or omission on his part in breach of such regulation is, of itself, in his Lordship's opinion, *prima facie* evidence that he has failed to take such care as a reasonable man would take of his own safety. Whether a breach of statutory duty by the plaintiff, not amounting to negligence at common law, will necessarily defeat his claim is still an open question. (4) Where statutory regulations have been published to a workman in the manner prescribed by statute, he must be taken to know what they provide, even though, in fact, he has not read them. The *Caswell Case* may also be referred to as an illustration of a case where the defendants had a statutory defence, under the Coal Mines Act, 1911, s. 102, if the temporary breach of statutory duty was one which it was impracticable to prevent—an exceptional defence.

Vowles v. *Armstrong-Siddeley Motors, Ltd.*, [1938] 4 All E. R. 796, is noteworthy for its ratification of the view taken in *Sowter* v. *Steel Barrel Co.* (1935), 154 L. T. 85, that the duty to fence dangerous machinery under the Factory Act, 1901, is an absolute one; the verdict of the jury that the plaintiff workman had not been guilty of contributory negligence and that the defendants had not failed in their statutory duty was held to be self-contradictory. Slesser, L.J., referred, apparently with approval, to the distinction drawn by Lord Wright in *Flower's Case* between "the deliberate operative act of the workman constituting

what has been called, I think, somewhat inaccurately, 'contributory negligence', and the case, as here, of an error of judgment".

Smith v. *Cammell Laird & Co.*, [1938] 2 K. B. 700, is dealt with elsewhere, but it is notable here as a case of "a factory within a factory", and for the dissenting opinion of Slesser, L.J., who, basing himself on the general principle of unity of occupation which underlies the Factory Acts, dissented from his colleagues.

Daniels v. *Vaux*, [1938] 2 K. B. 203, which concludes the review of statutory duty cases, is noteworthy for its application of the *per quod* principle of common law negligence to these actions. The defendant, at all material times the owner of a car, lent it to her son, who drove it as his own for two years until he knocked down the plaintiff. At the time of this accident, and to the knowledge of the defendant and her son, the policy of insurance, previously kept on foot by the defendant, had expired, but the defendant, before its expiry, had told her son and the insurance company that the son must in future pay the premiums. The plaintiff did not take proceedings against the son, but started negotiations with him which were not concluded when the son died, eighteen months after the accident. Humphreys, J., held that the son was not the defendant's servant or agent and that the defendant was not liable under the rule in *Monk* v. *Warbey*, [1935] 1 K. B. 75, which was distinguishable from the present case. In the earlier case, the inability of the plaintiff to recover damages was directly attributable to the defendant's failure to insure. But here the son was not insolvent, and his Lordship could not see how the defendant's breach of statute had "prevented the plaintiff from recovering damages which he otherwise would have got from someone else". He had a good cause of action against the son and, had he taken prompt steps to issue his writ, the action would have survived against the son's estate under the 1934 Act. His failure to recover his damages was his own, and not the defendant's, fault.

Nuisance, etc.

Shirvell v. *Hackwood Estates*, [1938] 2 K. B. 577, has been subjected to such detailed and trenchant criticism by Mr. C. J. Hamson in the *Modern Law Review*, Vol. 2, p. 215, and by the learned Editor of the *Law Quarterly Review*, Vol. 54, p. 459, that it is not proposed to review it at length

here. The plaintiff had leased a farm from the defendants, who also owned the land adjacent to it on which there stood a partly dead beech tree, a dead branch of which overhung the plaintiff's farm. One of the plaintiff's workmen was killed by the falling of this branch and his widow recovered under the Workmen's Compensation Act against the plaintiff, who now sought to be recouped by the defendants. In evidence, it was proved that the defendants had only recently acquired the estate, which contained thousands of dead trees, and that they had instructed a forestry expert to advise them and had received his preliminary report. Pending a later report, they had engaged two workmen to cut down some of the trees. The first point in the judgment of the Court of Appeal was that under the principle of *Cheater* v. *Cater*, [1918] 1 K. B. 247, the defendants owed no duty to their tenant, the plaintiff, as the danger existed at the time of the lease. Professor Goodhart criticises this view; in his opinion a distinction should be drawn between a case where the nuisance at the time of the lease continues to exist in its form or position at that time (*e.g.*, the yew trees in *Cheater* v. *Cater*) and a case where the cause of the nuisance is not kept in its position at that time (*e.g.*, the falling guttering in *Cunard* v. *Antifyre*, [1933] 1 K. B. 551, which, despite the criticism of it in this case, he considers a perfectly sound decision). The falling branch in this case, in his opinion, should fall under the latter head and was something the tenant was not bound to suffer. But the Court then took a much less defensible step when it held that because the tenant could not have recovered against the defendants, his invitee or licensee (here the workman, or his widow) could not be in a better position and could not sue the defendants. Mr. Hamson has criticised this mercilessly; it is based partly on the view that because there is a contract between A and B, C, a stranger to the contract, is affected by it. If C is availing himself of A's services under his contract with B, it is reasonable to affect C with the conditions of the contract. But here, the servant was not availing himself of the services of the defendants. The proposition was also partly based on decisions like *Robbins* v. *Jones*, 15 C. B. (N.S.) 221, *Lane* v. *Cox*, [1897] 1 Q. B. 415, and *Cavalier* v. *Pope*, [1906] A. C. 428, which Mr. Hamson distinguishes from the present case as having been based on the circumstance that the landlords therein involved were not in possession or control

of the dangerous premises, whereas here they were in possession and control of the beech tree. It is most regrettable that the Court saw fit to refuse leave to appeal to the House of Lords, were it only for the purposes of an elucidation of this tangled part of the law. The third point on which the Court has been criticised is the finding by Greer and MacKinnon, L.JJ., that the defendants had not been guilty of negligence. Bennett, J., refused to follow the majority and has been much commended for not doing so. The majority view was that the landlords had taken reasonable steps to reduce the dangers by calling in the expert and starting to fell some trees. But they gave no warning to the adjoining tenant or his labourer of the danger of *this* tree. Moreover, as Mr. Hamson points out, it is no answer to a charge of negligence that you have become alive to it, or that you are attending to some other source of danger which you have created, or for which you are responsible, elsewhere.

The decision of Atkinson, J., in *Newsome* v. *Darton U. D. C.* (*Annual Survey*, 1937, p. 185) was affirmed by the Court of Appeal: 54 T. L. R. 286. More emphasis was laid there on the principle of *Shoreditch Corporation* v. *Bull* (1904), 90 L. T. 210, defined by MacKinnon, L.J., as follows: "If a defect arises in a highway only as the result of the friction of traffic and the operation of natural causes, and that is not remedied by the authority, that is a defect arising only from non-feasance. Where, however, the authority, either in its capacity as highway authority or otherwise, does something to the surface of the highway, and that which it does is, in addition to the friction of traffic and the operation of natural causes, the origin of the defect which it does not remedy, then the defect may be regarded as the result of misfeasance, and not merely non-feasance." What the authority did here was a misfeasance, and, in any case, it was not acting as the highway, but as the sanitary, authority when it disturbed the road, and so the rule of *Russell* v. *Men of Devon* (1788), 2 T. R. 667, was inapplicable. *S. & R. S.S. Co.* v. *L.C.C.*, 61 Ll. L. Rep. 9, is a good illustration of the rather unusual case of a highway authority being held not liable in nuisance for a non-feasance, which resulted in the imprisonment of a ship in a dock, but being held liable for the negligence which occasioned the non-feasance.

In *Swain* v. *Southern Ry.*, [1939] 1 K. B. 77, the

plaintiff, injured by being thrown off his cycle owing to the bad condition of the road over a bridge belonging to the defendant company, claimed damages for negligence, nuisance, and a breach of statutory duty. The defendants contended that they were in the position of a highway authority and liable only for misfeasance; that they were entitled to the protection of the Public Authorities Act, 1893; and that they were only liable, if at all, to maintain the road in a state fit for the purposes of traffic such as that which used it in the year in which it was built. Humphreys, J., held that they could not succeed under any of these pleas. The Railway Clauses Consolidation Act, 1845, s. 46, the relevant section, on its true construction rendered the defendants liable for non-feasances as well as misfeasances. The company was not discharging a public duty in this case such as would bring it within the protection of the 1893 Act. Bicycles may not have been known in 1856, when the bridge was built, but the state of this road would have been dangerous even to such traffic as did then exist, such as the gig or the dog-cart, and it had not been maintained in the state in which it was when made.

The judgment of Branson, J., in *Sedleigh-Denfield* v. *St. Joseph's Society*, 159 L. T. 253, is due for review shortly in the Court of Appeal, and, therefore, it may be more convenient to postpone a detailed consideration of it until next year. About 1934, when a block of flats was being built at the side of the plaintiff's premises, which abutted on the premises of the defendants, who owned the ditch which separated them, the county council piped the ditch, without the consent or knowledge of the defendants, and failed to protect it from becoming blocked with debris. As a result, the plaintiff's premises were twice flooded, and he claimed damages from the society for negligence and nuisance, and from a second defendant, the lessee of the flats, for breach of covenant to repair, maintain and cleanse all sewers. The second defendant was exonerated without difficulty; the opening to the culvert was not on her premises and she could not get at it except as a trespasser. His Lordship found that the nuisance was one created by trespassers against the first defendants and that they did not know of the nuisance at any material time. Applying *Job Edwards* v. *Birmingham Navigations*, [1924] 1 K. B. 341, he held that the society had neither created nor continued the nuisance and was not

liable. It was equally open to the plaintiff and to the society to abate the nuisance and, in the circumstances, the plaintiff could not complain. Rejecting the plea that the society must be held liable at least for the second flooding, he again applied the same case and said that the damage arose because of the failure of the plaintiff to exercise his common law right to abate the nuisance and not by reason of any obstruction or failure on the part of the Society to give him notice. The rule in *Rylands* v. *Fletcher* was held inapplicable as the ditch was by way of ordinary user of land and there had been no extraordinary accumulation of water by the defendants which caused the damage. It will be of interest to see what view the Court of Appeal will now take of the *Job Edwards' Case* in view of the strong dissenting judgment of Scrutton, L.J., in it and its distinction between the rules applicable to public and private nuisances.

Att.-Gen. v. *Wilcox*, [1938] Ch. 934, was a case where a declaration was sought that posts erected by the defendant were a public nuisance and an injunction was claimed against him. He claimed to be the owner of the soil of land forming the towpath over which the public had a right of way and a right of towage. The posts did not substantially interfere with foot passengers but would to some extent obstruct the towage of barges by means of ropes. Farwell, J., said that *prima facie* it is an unlawful act to obstruct the public way in the smallest degree, but the Court will not interfere where what is done is of so trivial a nature as not to constitute a substantial interference; the question is one of degree. That the nuisance confers a public benefit is not *per se* a defence, but that is a matter to be taken into consideration and a trivial obstruction which does confer such benefit may be such that the Court will not interfere. The posts here did possibly add to the amenities of the public in some ways, but, considering the whole situation, the obstruction to towage and the dangers of the unlit posts at night to pedestrians, he thought they constituted an obstruction to a sufficient degree to justify the claims for the declaration and the injunction.

The judgment of Goddard, L.J., sitting as an additional Judge, in *Paine* v. *St. Neots Gas and Coke Co.*, 55 T. L. R. 150, deserves a short reference here on the finding that there seems to be no authority which holds that a person who sues to protect an easement, either in trespass or case, has not to prove as part of his case his right to the easement. A person

who is in possession of a profit can maintain an action for trespass against a person who disturbs him in his enjoyment. The view that what was sought to be created here was not a profit but a rather novel sort of easement is a matter for discussion elsewhere.

Inducing a breach of contract.

British Industrial Plastics, Ltd. v. *Ferguson*, [1938] 4 All E. R. 504, the facts of which are rather too lengthy for repetition here, raised claims for breach of contract of service, inducing a breach of contract, and conspiracy. The Court of Appeal agreed that the last two claims failed on the finding that what the defendants had done was done *bona fide* under an illogical and muddle-headed belief that once the patentability of the process communicated to them by the plaintiff's former employee was established by their patent-agents it would establish their immunity in receiving and working it. There was no "wilfulness" to satisfy the tort of inducing a breach of contract and "no concert with a guilty state of mind" to constitute conspiracy. Slesser, L.J., broke new ground with his view that, in any case, the defendants would have the lawful justification for procuring the publication of the secret process to their patent agents of protecting themselves from any risk of misuse of the plaintiff's secret by themselves or their informant. His Lordship and MacKinnon, L.J., differed on the question of the proof of damages in the tort of inducement, but, with respect, the latter's views seem to be partly based on a doubtful application of the law relating to what does, and what does not, amount to a *novus actus interveniens*. On the question of what damage must be proved to constitute a cause of action in this tort, it is clear from the state of the authorities and of the text-books that further elucidation of it is required. At least a *prima facie* case can be made in favour of both views expressed in this case.

Passing-off.

The judgment of Morton, J., in *Worsley* v. *Cooper*, [1939] 1 All E. R. 291, is particularly worthy of reference on the tort of false and malicious statements concerning another's business, especially on the point that a general loss of custom is sufficient proof of damage to sustain the action. A very interesting part of the judgment is where his Lordship stated that, if he were wrong on the question of what constitutes sufficient proof of damage in the tort of malicious statement, the plaintiffs could still succeed by using the malicious statement as the basis for a claim for a species of passing-off,

in which case it would be unnecessary for them to prove either malice or special damage.

Limitation of actions.

Dismore v. *Milton*, 55 T. L. R. 20, lays down that, except in cases to which the Real Property Limitation Acts apply, it is not possible for the defendant to have the statement of claim struck out on the ground that it discloses no cause of action because of a bar of limitation of action. The reason is that the plaintiff may be able to show that he can bring his action within one of the exceptions contained in the Limitation Act, 1623, s. 7. But in actions relating to real property, the plaintiff has to state his title and the title is extinguished by the lapse of time.

Public Authorities Protection Act, 1893.

Greenwood v. *Atherton*, 55 T. L. R. 222, and *Griffiths* v. *Managers of St. Clement's School*, [1938] 3 All E. R. 587 (a case now on appeal), both involved some intricate consideration of the position of the managers of non-provided voluntary schools after the Education Acts, 1902 and 1921. In both cases it was held that they came within the protection of the Public Authorities Protection Act, 1893, s. 1, as they were discharging "public duties" within the meaning of the Acts. The former case is noteworthy because of the fact that the head teacher was held to come within the same protection as the managers, and the latter for the fact that the parents of school-children invited to attend a display of the work done at the school are invitees and not licensees, the "material interest" being "the interests of the prosperity and success of the school and co-operation of the parents in the work done at the school". The judgment of Branson, J., in *Hawkes* v. *Torquay Corporation*, 61 Ll. L. Rep. 289, applied the principle laid down by Lord Buckmaster in *Bradford Corporation* v. *Myers*, [1916] 1 A. C. 242, 247, that a public authority enjoys the protection of the Act not because the act done was within its statutory powers but because it was done in the direct execution of a statutory direction or in the discharge of a public duty, or in the exercise of public authority, the duty being owed to all the public alike and the authority being exercised impartially with regard to all the public. Here, an authority which was not compelled, although it was empowered, to build a pier pavilion could not claim the protection of the Act of 1893 in respect of an act of negligence occurring in the course of running the pavilion.

LITERATURE

New Books

The Law of Negligence. By J. Charlesworth. London: Sweet & Maxwell, Ltd. lxviii and 576 pp. 40s.

This is certainly "the book of the year" in this Section. From the Preface it appears that it is meant to take the place of *Beven on Negligence*, which is described as a work planned when the relative importance of the various subjects dealt with in it was very different from what it is to-day and as one which is somewhat unwieldy. It is not quite clear whether the older classic is not to appear in a new edition again, but, whether that be so or not, Dr. Charlesworth's work is bound to become an indispensable one. It is planned on a smaller scale than *Beven*; it does not deal with what Beven described as "special relations arising out of contracts" nor with the Admiralty side of the subject. Dr. Charlesworth's many previous contributions to the learning of the law of tort are too well known to require enumeration and they are embodied in this new work with much more besides. That he can take a line of his own is only too apparent from the footnotes of some of the general text-books on the subject, and in this volume there is constantly some view or other which makes one sit up. Thus he almost starts off with the large proposition that the tort of negligence must be limited to cases of *physical* injury to person or property and that this restriction follows "a true line of distinction". It is impossible here to follow all the matters of contention on which the Author speaks with no two voices, and it must suffice to note that the book cannot be ignored on the subjects of dangerous premises, things (dealt with generally and in special chapters devoted to specific classes of things), animals, and breaches of statutory duties. Lord Campbell's Act receives detailed notice, but the Law Reform Act, 1934, will need more attention in subsequent editions.

Cases on the Law of Tort. By P. H. Winfield. London: Sweet & Maxwell, Ltd. xvi and 303 pp. 15s.

Last year we hailed the *magnum opus* of the master; this year we welcome this complementary volume containing a selection of seventy-seven leading cases, well-chosen,

admirably summarised, and accompanied by a useful glossary of terms which might present difficulties to students. Compiling a case-book is much like making an anthology of poetry; there are some judgments which compel inclusion, but the insertion or exclusion of others is a matter of individual taste or bent. There will be many, no doubt, who will argue about this case-book that such-and-such a case should have been in, or that the judgment of Jones, L.J., was preferable to that of Smith, M.R., in *X* v. *Y*. To such possible criticisms there is no end, and we do not propose to start on them here.

New Editions

Gatley on Libel and Slander. Third edition. By Richard O'Sullivan. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. cxlix and 962 pp. 63s.

This is a most successful example of re-editing the work of another. As Lord Atkin says in a foreword: "It is a good book". The dedication is "*Auctoris Amici In Memoriam*"; and Mr. O'Sullivan was the person designated in the will of Dr. Gatley to edit his standard work. The care with which he has performed the task is as fine a tribute as he could pay to the memory of his friend. The editor has not only kept an eye on recent English, Scottish and Irish cases, but also on the Canadian, Australasian, South African, Indian and American authorities. (Nearly seventy American decisions not in the former edition have been observed to have been included in the present one.) Recent statutes, particularly the County Courts Act, 1934, and the Law Reform Act, 1935, have been carefully noted, and the discussion of contribution between joint tortfeasors in defamation is particularly noteworthy.

The Law of Torts. By S. Ramaswamy Iyer. Second edition. The Madras Law Journal Office, Mylapore, Madras. lxxxv and 732 pp. 20s.

One teacher of the subject, at least, has always found the first edition of this work of very considerable use by his side, as it frequently contained matter not found in other works. The second edition is, therefore, much welcomed, particularly as the author has maintained an eagle eye on recent authorities.

Trial of Motor Car Accident Cases. By A. D. Gibb. Second edition. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. vi and 350 pp. 30s.

The Law of Collisions on Land. By the same author and the same publishers. Fourth edition. xli and 468 pp. 30s.

The first edition of the former work appeared in 1930, and the previous edition of the latter work in 1932. There is such an accumulation of material in the course of the march of time that it has caused the prices of these works to rise very steeply. It is probably only the publishers who can explain why the smaller work should cost as much to the purchaser as the bigger one; it certainly appears to be very expensive for its size. But that is not to derogate from our congratulations on the care and skill which the learned author has shown in bringing this constantly expanding subject up to date. He has had to battle with several most important statutes, numerous orders and the Highway Code, all new since his last edition. In the larger work he has devoted a new chapter to insurance.

Articles

One of the most interesting articles of the year was that of Professor Goodhart in the *Modern Law Review*, Vol. 2, p. 1, in which he challenges the Pollock-Winfield view of a general basis of liability in tort. He argues (i) that there is no agreement amongst the exponents of the general-principle-doctrine on the nature of that principle; (ii) that there is no agreement on its origin; (iii) that the view is devoid of the authority of decisions; (iv) that the theory is based on a misrepresentation of the judicial process; (v) that if the theory is correct, there ought to be much learning on the nature of the general defences, the excuses and the justifications, which is manifestly not the case; (vi) that though the theory is innocuous in practice, as no counsel ever seems to have based an argument on it, yet it has its dangers from the scholastic standpoint. "However desirable it may be to have a general principle in the law of torts, it is, we believe, a case of wishful thinking to say that it exists at the present time." So now it will be Professor Winfield's turn! The May number of the *Wisconsin Law Review* was entirely devoted to consideration

of some problems in the law of torts, and those who seek a modern review of the subject of causation, on which there is such a confusingly abundant amount of literature, will welcome the contribution of Professor Campbell on "Duty, Fault, and Legal Cause" (Vol. for 1938, p. 403). In the same volume (p. 365), Associate-Professor Gregory has an article on "Contribution amongst Tortfeasors", a subject of topical interest in England.

Mr. T. B. Barlow, who proposes to collect the various parts of his doctorate thesis into one volume, contributed several articles on the "South African Law of Vicarious Liability in Delict" to the *South African Law Journal*, Vol. 55. From a comparative standpoint it may be useful to read his studies of the subjects of "The Scope of Employment", "The Master's Liability for Delicts", "Vicarious Liability for Acts of Children", "The Rights of a Husband or Wife against whom a delict is committed by the other party to the marriage". In the same volume Mr. R. G. McKerron's article on "Civil Actions founded upon Breach of Statutory Duties" touches upon a subject very much to the fore in England at the moment.

Professor Goodhart's article on "Hospitals and Trained Nurses" in the *Law Quarterly Review*, Vol. 54, p. 553, ably reviews a subject on which there have been some leading decisions in this decade and which troubles those responsible for voluntary hospitals not a little. The article is likely to incite similar contributions to journals abroad and an anonymous note in the *Yale Law Journal*, Vol. 48, p. 81, on the United States law on "Liability of Hospitals for Injuries to Patients using Hospital Facilities" is notable. Reference has been made in the text to Mr. Hamson's article on the *Shirvell Case*. On the question of liability for dangerous chattels, reference was made last year to Mr. Chapman's article in the *Law Quarterly Review*, Vol. 54, p. 46, and Professor Fowler Harper's article on "Liability in Anglo-American Law for Damage done by Chattels" in the *Toronto Law Journal*, Vol. 2, p. 280, is very worthy of attention. In view of the topical interest of the subject after the *Snail Case*, attention should be drawn to the review of the American law on "Manufacturers' Liability for Injuries Caused by their Productions: Defective Automobiles", by Professor Feezer of Arizona in the *Michigan Law Review*, Vol. 37, p. 1. The problem of the assessment of damages

for loss of expectation of life is so much with us that attention may be drawn to the two contributions on the subject in the *Canadian Bar Review*, Vol. 16, pp. 119, 193, by Mr. F. A. Brewin and Dr. C. A. Wright.

On the topic of negligence, the traffic cases naturally attract attention. Mr. E. Wyndham White writes on "The Burden of Proof of Negligence in Running-down Cases" in the *Cambridge Law Journal*, Vol. 6, p. 484. "The Position of the Injured Third Party" is discussed in the *Modern Law Review*, Vol. 1, p. 258, by Mr. Hector Hughes, K.C., who describes the cases in which the rights of the injured third party are still not completely protected. Professor Chorley and Mr. A. M. Finlay followed this article with complementary notes (Vol. 2, pp. 86, 88). Dr. E. D. Weiss contributed to the same journal a very useful comparative study on "Legislation and Road Accidents" (Vol. 2, p. 189). Apart from the traffic cases, Associate-Professor Fleming Jones, jr., in his contribution to the *Yale Law Journal*, Vol. 47, p. 704, on "Last Clear Chance: A Transitional Doctrine", explored the legal principles and formulæ which have been advanced to explain that well-known rule. Mr. T. P. Whelan's treatment of the subject of "Comparative Negligence" in the *Wisconsin Law Review*, Vol. for 1938, may also be mentioned.

In view of *Owen's Case*, discussed in the text, attention should be drawn to the exhaustive study by Professor Fowler Harper and Miss McNeely in the *Wisconsin Law Review*, 1938, p. 426, on "A Re-examination of the Basis for Liability for Emotional Distress". The United States is also experiencing some remarkable cases of this nature, as indicated by the notes in the *Yale Law Journal*, Vol. 48, p. 303, and the *Tulane Law Review*, Vol. 12, p. 272.

The interesting case of *Victoria Park Racing Grounds* v. *Taylor* (1937), Argus L. R. 597, occasioned the writing of Professor G. W. Paton's article on "Broadcasting and Privacy" in the *Canadian Bar Review*, Vol. 16, p. 425. For purposes of comparison, mention may be made of the note in the *Yale Law Journal*, Vol. 48, p. 288, on "Unfair Competition and Exclusive Broadcasts of Sporting Events". In Vol. 47 of the same journal may be found a contribution on "Unfair Competition by Truthful Disparagement" by Mr. John Wolff, a comparative study of how far the provisions of "codes of fair practices", so beloved in some parts of

the world, have or can be translated into law. The article is of interest because it deals with *truthful* disparagements. On defamation, the Rt. Hon. Lord Normand, Lord President of the Court of Session, wrote learnedly in the *Cambridge Law Journal*, Vol. 6, p. 327.

Other articles of interest may be found in the *Law Journal*, the *Solicitors' Journal*, and the *Law Times*.

MERCANTILE LAW

1938 has been an important year, if only because of the Hire-Purchase Act, 1938, a statute of great social significance, and introducing new judicial discretions in connection with the performance of a common type of contract the exercise of which will be watched with great interest and which may have a vital effect in connection with future developments.

There have been interesting decisions, if nothing of outstanding importance. Reference may be made particularly to the Banking Section where difficult problems in connection with the Bills of Exchange Act, 1882, and the working of the bankers' documentary credit have been discussed; to Carriage where there has been an important difference of opinion on the subject of deviation (*Reardon Smith, Ltd.* v. *Black Sea & Baltic General Insurance Co.*, [1938] 2 K. B. 780); to Marine Insurance, where the problem of constructive total loss of freight has continued to cause difficulty; to Motor Vehicle Insurance where difficulties have continued to occur in connection with compulsory third party insurance, and where it is more and more evident that some more radical solution of the difficulty is required than that furnished by the Road Traffic Acts (see *Modern Law Review*, Vol. I, p. 258; Vol. II, p. 86); and to Hire Purchase where on the eve of the coming into operation of the Hire-Purchase Act, 1938, there has been an unusual number of interesting decisions.

In the Literature there is to report the important work of Dr. F. A. Mann on *Legal Aspects of Money*, a further valuable contribution from continental scholarship to English legal literature, and an interesting new venture by Miss D. Dix, *The Law of Competitive Trading*. New editions of several standard text-books have appeared.

LEGISLATION

The *Hire-Purchase Act*, 1938, is a measure of first-class importance both because of the fundamental changes which it effects in the law relating to an important type of commercial contract, and because of the social consequences which these changes are likely to have. It is not without significance that it should have originated in a private member's Bill. 1 & 2 Geo. 6, c. 53.

(See a note in the *Modern Law Review*, Vol. II, p. 51.) One of the most important features of this measure is the number of discretions conferred upon the Courts.

The Act covers the ordinary hire-purchase agreement where the price does not exceed one hundred pounds, though exceptionally this figure is reduced to fifty pounds in case of motor vehicles and railway rolling stock, and increased to five hundred pounds in the case of livestock. What are called credit sales agreements, also covered, are ordinary instalment sales providing for at least five payments : their inclusion was necessary to prevent evasion of the main principles of the statute (section 1).

The contract will not be enforceable unless (*a*) the " cash price " is brought to the buyer's knowledge in writing before the agreement is made and (*b*) there is a written memorandum signed by the hirer personally, and by or on behalf of the other party, setting out various matters of which the more important are the cash and hire-purchase price of the goods, the amount and dates on which instalments are payable, a list of the goods comprised in the agreement, and of the hirer's right to determine the agreement and return the goods to the owner—this latter provision must be in the words of the Schedule to the Act (section 2). It is important to notice, however, that the Court is given a discretion to waive omissions in the above respects in a case where the hirer has not been prejudiced, though this does not extend as far as the memorandum itself, which is absolutely required. A similar provision (section 3) relates to credit-sale agreements.

The hirer's right to determine the agreement at any time before payment of the final instalment is absolute. He must do so in writing. If he does so the owner becomes entitled to recover not only his goods, but a minimum payment calculated so that he will have received altogether half the purchase price. The hirer may, in addition, have to pay damages for having failed to take due care of the goods (section 4). The owner may benefit unduly under this section, for the purpose of the minimum payment is to give full compensation against depreciation. It is modelled on a clause which has long been in use.

The owner can no longer bargain for the right to enter upon the premises where the goods are and to retake them on default (section 5). Certain other clauses commonly found in hire-purchase contracts are avoided, such as that relieving

the owner for the acts or defaults of his agents (section 5). Any clause restricting the right of the hirer to determine the agreement, or imposing upon him a liability greater than that provided by section 4 (above) is avoided.

By section 6 a valuable right is conferred upon the hirer to be provided with a copy of the agreement, and a note in writing of the amount paid, the amount owing, and the amount still to be paid. If the owner fails to provide these documents he cannot enforce the contract, or any guarantee or security given in support of it. Conversely the hirer, in cases where the contract provides that he shall keep possession of the goods, must give information as to their whereabouts if called upon to do so. Failure without reasonable cause is a criminal offence.

Section 8, which is of very great interest, establishes a number of implied conditions and warranties as to title, fitness, etc., which are parallel with those in sections 12 and 14 of the Sale of Goods Act, 1893, but here there is an important proviso against contracting out. The condition as to title is to take effect at the time when the property is to pass, thus overruling *Karflex, Ltd.* v. *Poole*, [1933] 2 K. B. 351, a case which was criticised in the *Annual Survey*, 1933.

Sections 9 and 15 are aimed at preventing the linking-up of agreements, a common device under which a hirer who had completed his payment on one purchase found that he had not acquired a title to the goods because he was in arrears with his instalments under a later one. The hirer may also appropriate his payments over different agreements as he likes.

The important section 11 prevents the owner, in cases where one-third of the purchase price has been paid or tendered, from retaking possession of the goods except under an order from the Court, unless the hirer has himself terminated the agreement. The prevention of "snatching back" achieved by this section was probably the principal objective of the sponsors of the measure. The Court is given one of the widest discretions ever conferred upon Courts in this country (section 12), for it can make an order for the payment of the balance of instalments as it thinks fit, thus in effect making a new contract for the parties. The whole of this long section which deals with the powers of the Court in connection with proceedings is important and will repay careful study.

There are other provisions relating to bankruptcy, distress, jurisdiction, etc., which space does not permit us to discuss here.

1 & 2 Geo. 6, c. 17.

The *Cinematograph Films Act*, 1938, contains in section 25 (2) a definition of a "British company" for the purposes of Part III of the Act, which deals with registration. This definition is of some general interest. "The expression 'a British company' means a company incorporated under the laws of any part of His Majesty's dominions, being a company the directors of which, or the majority of the directors of which, were British subjects" during the relevant period.

1 & 2 Geo. 6, c. 46.

Section 24 of the *Finance Act*, 1938, supplements the provisions in section 12 of the Finance Act, 1937, mentioned in the *Annual Survey*, 1937, p. 200. Where the owner of securities sells or transfers the right to receive interest or dividend, without disposing of the securities, he, and he alone, remains assessable to income tax for the interest or dividend, and if he disposes of his right to future interest or dividend, even that future interest or dividend is treated as income of the year in which the disposition takes place. Section 26 of the same Act, dealing with the valuation of trading stock on discontinuance of trade, will be of importance in connection with company amalgamations. There should also be noted section 41 (4) (*e*), dealing with "a body corporate connected with a settlement"; section 42 and the Fourth Schedule, dealing with subsidiary companies and other kindred matters in connection with National Defence Contribution; and in particular section 50, restricting the relief of stamp duty granted in cases of transfer from one "associated company" to another.

Trade Marks.

The *Trade Marks Act*, 1938, marks a further stage in the consolidation of statute law. It is more fully dealt with under Property. Again there is the *Food and Drugs Act*, 1938, which consolidates a very large number of statutes going right back to an Act Concerning Phisicians of 32 Hen. 8. (See under Administrative Law.)

1 & 2 Geo. 6, c. 29.

The *Patents (International Conventions) Act*, 1938, gives effect to an International Convention for the protection of Industrial Property and amends the Patents and Designs Acts, 1907 to 1932, as to matters thereby affected. It also gives effect to an International Agreement as to false indica-

tions of origin on goods and amends the Merchandise Marks Acts, 1887 to 1926, with respect to matters thereby affected.

The main object of the *Air Navigation (Financial Provisions) Act*, 1938, is to make increased provision for the subsidising of air navigation. Air Navigation. 1 & 2 Geo. 6, c. 33.

Subordinate Legislation

There has been the usual flood of Statutory Rules and Orders. Though many of these affect commercial men they are naturally administrative in character and only a few call for mention.

Air Navigation (Licensing of Public Transport) Regulations (S. R. & O., No. 1106).

Air Navigation (Licensing of Public Transport) Order (S. R. & O., No. 613). Extensive licensing provisions. Authority: section 5, Air Navigation Act, 1936.

Aircraft (Wreck and Salvage) Order (S. R. & O., No. 136).

Part IX of the Merchant Shipping Act, 1894, is made applicable to aircraft. Authority: section 28, Air Navigation Act, 1936.

Air Navigation (Compulsory Acquisition of Land) Regulations (S. R. & O., No. 207).

Fifteen other Orders.

Some dozen important Orders have been made relating to Agriculture.

Business Names Rules (S. R. & O., No. 108), pursuant to section 17, Registration of Business Names Act, 1916; contains new forms.

Clearing Office (Italy) Amendment Order (S. R. & O., No. 234). Modification of Clearing Agreement.

Clearing Office (Roumania) Amendment Order (S. R. & O., No. 285). Necessary by reason of variation of Anglo-Roumanian Payments Agreement.

Clearing Office (Roumania) Amendment (No. 2) Order (S. R. & O., No. 908).

Clearing Office (Turkey) Amendment Order (S. R. & O., No. 580).

The Fishing Industry has received attention with ten Orders.

Three Orders of no special interest on Merchandise Marks.

Thirteen Orders have been made on Merchant Shipping. Among these may be mentioned:—

Merchant Shipping (Life Saving Appliances) Rules (S. R. & O., No. 1375), under section 427, Merchant Shipping Act, 1894, and sections 4 and 5, Merchant Shipping Act, 1932.

Merchant Shipping (Wireless Telegraphy) Rules (S. R. & O., No. 1546), under Merchant Shipping Acts, 1919 and 1932.

Post Office Savings Bank Regulations (S. R. & O., No. 556).

On Customs there have been :—

Fourteen Additional Import Duties Orders,

Nineteen Drawback Orders, and

Eight Exemption Orders.

We may refer particularly to Import Duties (General Ad Valorem Duty Reduction) Order (S. R. & O., No. 1540).

CASE LAW

General

Gold clause.

There has been some slackening in the spate of cases relating to the construction of gold clauses in contracts. Possibly the recent decisions in the House of Lords have sufficiently clarified the position. *British and French Trust Corporation* v. *New Brunswick Ry.*, 43 Com. Cas. 110, which is more fully discussed under Conflict of Laws, was disposed of comparatively easily by the Court of Appeal on the basis of *Feist's Case*, [1934] A. C. 161. This decision has since been upheld by the House of Lords (44 Com. Cas. 82), save for a variation respecting the payment of interest.

In *A. L. Sturge & Co.* v. *Excess Insurance Co., Ltd.*, 44 Com. Cas. 40, there was no gold clause, but the plaintiffs attempted by an ingenious argument to attain the position which would have ruled had there been one. The plaintiffs were bondholders under contracts which contained gold clauses. They insured themselves with the defendants against the risk of failure by their debtors to pay up on the bonds. Subsequently the debtors, being United States and Canadian municipalities, were able to rely upon domestic legislation allowing for the discharge of debts in depreciated currency, and paid their interest and principal upon that basis. On a claim being made by the plaintiffs against their insurers, they contended that since an insurance contract is a contract of indemnity they were entitled to recover the difference between the gold value and the depreciated value of the

debts. It was held, however, that the defendants had only guaranteed payment in such currency as might be legal tender at the time of payment.

Agency

Agent's duty to make best bargain.

The decision of the Privy Council in *Firm of Gokal Chand-Jagan Nath* v. *Firm of Nand Ram Das-Atma Ram*, 55 T. L. R. 15, is of some importance. The respondents were commission agents employed by the plaintiffs in connection with the sale of goods. Certain of the buyers got into financial difficulties, and the defendants, without any express authority from the plaintiffs to do so, accepted certain sums on account, and gave credit for the balance. It was found as a fact that in doing so the defendants had acted in the best interests of their principals. It was contended, however, that an agent's authority goes no further than to accept cash, and that accordingly the defendants had acted in breach of their duty and should pay damages. The Privy Council while recognising, as indeed they must, the general duty, held that it does not apply to a case where the debtor is obviously in financial difficulties. In such cases they held that it is the agent's duty to act in the best interests of his principal, and in these circumstances the plaintiffs could only recover if they could show that the defendants had failed to get in cash which by reasonable exertions they could have obtained. Here the evidence was to the contrary, and the defendants were not liable.

Liability for forgery of agent.

The question of the liability of a principal for the criminal acts of his agent has given rise to much difficulty especially in cases of forgery. *Uxbridge Permanent Benefit Building Society* v. *Pickard*, 159 L. T. 572, is a useful case on this topic. It is discussed further at p. 240.

Banking and Negotiable Instruments

Pledge of documents under trust receipt.

The important decision of Porter, J., in *Lloyds Bank, Ltd.* v. *Bank of America National Trust and Savings Association* (see *Annual Survey*, 1937, p. 205) has now been unanimously affirmed by the Court of Appeal, [1938] 2 K. B. 147. Documents of title hypothecated by merchants with the plaintiffs had been handed back to them for the purpose of effecting sales under the familiar terms of a trust receipt. The merchants then in fraud of the plaintiffs pledged the

documents with the defendant, and this transaction was held to be valid by virtue of the Factors Act, 1889, s. 2 (1). On the appeal the main contention of the plaintiffs was that the Act only covers cases where goods or documents are in the possession of the factor with the consent of the owner, and that the bank being pledgees could not properly be regarded as owners. The Court considered that in the special circumstances of the case, and in view of the terms of the letter of hypothecation under which the plaintiffs had received the documents, they could properly be regarded as owners. In any event the plaintiffs and the merchants together had the full ownership, so that the documents were in the possession of the merchants with the consent of the owners. The plaintiffs made the point that if the decision went against them the commercial value of the trust receipt would be greatly diminished, to which MacKinnon, L.J., replied (p. 166): "I do not apprehend any such danger or difficulty. The truth is that almost every aspect of commercial dealing is not proof against the possible result of the frauds, that a lawyer thinking of the possibilities of such things might suppose to be so easy, but which in business in fact occur rarely."

In *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.*, [1938] A. C. 287, the Privy Council had before them an exactly similar set of facts except that there was no formal trust receipt. In India, however, there appears to be no Factors Act and therefore the plaintiffs, the first pledgees, succeeded in their action against the second pledgees. The defendants sought to establish an estoppel, contending that the plaintiffs had failed to take proper precautions or alternatively had represented that the merchants were authorised by them to make an effective pledge of the goods. The Privy Council, however, found that there was no duty on which the plea of neglect could rest, nor did the action of the plaintiffs in allowing the merchants to have the documents of title amount to a representation to third parties. The judgment which was delivered by Lord Wright contains an interesting commentary on the famous remark by Ashurst, J., in *Lickbarrow* v. *Mason*, 2 T. R. 63, that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it".

Effect of garnishee order.

In *Hirschorn* v. *Evans*, [1938] 2 K. B. 801, the Court of Appeal upheld the practice of the banks in refusing to regard

a garnishee order *nisi* attaching a balance in customer A's account as covering the joint account of A and B—in this case husband and wife. This is an important decision, for it obviously opens up possibilities of evasion which are only too likely to be taken advantage of. The method of transferring property to one's wife in order to avoid legal process is well known, and this case may provide additional machinery for effecting it. From this point of view the dissenting judgment of Greer, L.J., is perhaps to be preferred.

"Not negotiable" bill of exchange.

In *Hibernian Bank* v. *Gysin and Hanson*, [1938] 2 K. B. 384, Lewis, J., had to consider a bill of exchange drawn in the unusual form "Pay to the order of A only" and crossed "not negotiable". The question at issue was whether such an instrument could be so transferred as to confer a title upon the holder. By section 8 (1) of the Bills of Exchange Act, 1882, words prohibiting transfer or indicating an intention that a bill of exchange shall not be transferable make the instrument not negotiable. In the view of the learned Judge the obvious intention of the drawer was to prohibit transfer. He said (p. 392): "I cannot conceive any stronger words written across a bill of exchange than the words 'not negotiable'. They must have some meaning and they clearly do not have the same meaning as if they were written across a cheque." Their meaning when written across a cheque is of course expressly provided for in section 81 of the statute. It was strenuously argued that since the instrument was payable to order its negotiability was not cut down, and reference was made to the judgments of Lindley and Fry, L.JJ., in *National Bank* v. *Silke*, [1891] 1 Q. B. 435, where a contention to this effect was accepted. In the opinion of Lewis, J., however, these were properly to be regarded as *dicta* only, and he refused to follow them, holding that section 8 (1) applied, and that the instrument was not negotiable.

Duties of collecting and paying banker.

Carpenters' Company v. *British Mutual Banking Co., Ltd.*, [1938] 1 K. B. 511, gave rise to several interesting questions. The plaintiffs, a city company, kept their banking account with the plaintiffs. They owned a home which was administered by a committee, of which one Blackborow was secretary. He made use of his position to conduct a series of frauds which gave rise to the present action. He drew cheques payable to tradesmen who had supplied goods to the home in payment of their accounts. To these he obtained

the signatures of the appropriate officers of the plaintiffs. He afterwards forged indorsements to these cheques in the names of the various payees, and paid them for collection into the defendant bank, where he also had an account. The cheques in question were crossed. On the discovery of the frauds the plaintiffs sued the defendants for the conversion of the cheques, and claimed the amount thereof as damages.

The main question debated was whether, granted that the bankers had acted negligently in collecting cheques for a person whom they knew to be employed by the drawer of such cheques without making adequate inquiries as to how he came to be paying them into his personal account, negligence which was found in fact to have occurred, he had still the right to claim the protection given to paying bankers by section 60 of the Bills of Exchange Act, 1882, when they pay cheques upon forged indorsements. This inquiry involved several points, namely:—

(*a*) Whether, if he has been guilty of conversion as collecting banker in such circumstances as not to be entitled to the protection of section 82, which was the case here, the banker can fall back on the protection of section 60 in cases where he can show that he is paying banker as well. On this the Court of Appeal, reversing Branson, J., by a majority held that he could not do so, and that the defendants were therefore liable.

(*b*) On the assumption that Branson, J.'s decision was correct, did the fact that the banker had behaved negligently disentitle him to rely upon section 60? The protection given by this section is made dependent on the banker having acted in good faith in the ordinary course of business, but it was contended that since the banker is at common law under an obligation to take care when paying his customer's mandates, he remains under the duty which has not been expressly removed by the statute. The Court of Appeal agreed with Branson, J., in holding that on a proper construction of the section negligence does not forfeit the protection given, though Greer, L.J., did not find it necessary to decide the point.

(*c*) On the same assumption it was contended that in any event the bank as paying bank was protected by section 19 of the Stamp Act, 1853, which grants a protection on the same lines as section 60 of the Bills of Exchange Act, 1882, but without expressly laying down any conditions. The

answer suggested to this, and it appears in theory to be a valid one, was that the banker is only protected while carrying out his obligations to his customer as to good faith, due care, etc. The Court of Appeal, however, did not find it necessary actually to decide this point as they were of opinion that section 19 had been impliedly repealed by the passing of section 60. It should be added that there is some authority in support of the bank's contention under this head in *Bissell & Co.* v. *Fox Brothers & Co.* (1885), 53 L. T. 198.

Bankruptcy

Agreement not to prove.

Although *John* v. *Mendoza*, [1939] 1 K. B. 141, may at first sight appear a hard case, it is easily justifiable upon grounds of public policy. The defendant owed a substantial sum of money to the plaintiff. A receiving order was made against him as a result of proceedings by some other creditor. The plaintiff accordingly proposed to file a claim. The defendant thought that if he could get the plaintiff's claim out of the way he could come to an arrangement with his other creditors which would enable him to get the receiving order discharged. He accordingly induced the plaintiff to write to the Official Receiver informing him that he had given the money as a present to the defendant who was therefore no longer indebted. At the same time the defendant gave the plaintiff a letter acknowledging that the debt was still owing. Having got his order annulling the bankruptcy the defendant failed to pay up, whereupon the plaintiff sued him. *Held*, by du Parcq, L.J., that the order annulling the bankruptcy amounted to an estoppel of record against the plaintiff whose claim must accordingly fail. It is, of course, contrary to the whole spirit of Bankruptcy Law that a creditor should keep out of the proceedings in return for receiving full payment of his debts at a later stage, and although the plaintiff in this case was rather hardly used it is essential that the principle just referred to should be consistently applied.

Married woman.

Re a Debtor (No. 21 of 1937), [1938] Ch. 694; 54 T. L. R. 897; 159 L. T. 115, is an interesting example of how far Courts are prepared to go in the application of strict logical rules, though justice may thereby be defeated. A judgment was obtained against a married woman for

£77 5s. in respect of a series of purchases of furs. Allowing for some small payments on account the sum of £1 13s. 6d. out of this judgment debt was attributable to purchases made before the Law Reform (Married Women and Tortfeasors) Act, 1935, came into force. It is under this Act that a married woman can be made a bankrupt. Since this small fraction of the judgment debt had been incurred before the crucial date the Court of Appeal, reversing a Divisional Court which had not strained at the gnat, held that no bankruptcy notice could properly issue. The judgment debt must be regarded as one and indivisible.

Divorce damages.

In *Re a Debtor* (*No. 975 of 1937*), 54 T. L. R. 814, the Court of Appeal decided a short point of some importance. The debtor had been co-respondent to a divorce petition, and the sum of £2,000 damages had been awarded against him. After various orders had been made in respect of this sum which the debtor failed to comply with the creditor obtained an order for the payment of £1,000 to himself for his own benefit. It was upon this order that a bankruptcy notice had issued, and a receiving order had been made. It was contended for the debtor that the Divorce Court had no jurisdiction to make an order of the kind made, and that until the money had been got into Court no order relating to its final destination was valid. The Court of Appeal held, however, that though it might not be the normal practice of the Divorce Court to make such an order it was quite within its competence under section 189 (3) of the Judicature (Consolidation) Act, 1925, to do so. The receiving order accordingly stood.

Service.

We drew attention in the *Annual Survey* for 1937 (p. 210) to the importance of a strict regard to the rules relating to the service of process in connection with bankruptcy. *Re a Debtor* (*No. 441 of 1938*), [1939] 1 Ch. 251, is evidence of a welcome attention to this matter. The debtor had been served abroad, apparently personally though the evidence on this point was not clear, with a sealed copy of the petition. The copy, however, was contained in a sealed envelope which had nothing on its cover to indicate the nature of its contents. In these circumstances the Court of Appeal held, confirming the Registrar in Bankruptcy, that there was insufficient evidence of proper personal service. The result is that the server must draw attention to the contents of the document, or they must be sufficiently evident on the face of it.

Carriage

Compania Naviera Bachi v. *Henry Hosegood & Son, Ltd.*, 60 Ll. L. Rep. 236, is interesting as containing a discussion of a maritime peril seldom met with in the modern reports, *viz.*, barratry. The crew of a Spanish vessel claimed that when they were paid their wages in England they were entitled to a rate of exchange higher than that ruling in the market, and refused to allow unloading to proceed properly when their demands were not conceded. In the result delivery was held up, and various expenses were incurred by the receivers for which they sued the shipowners. The latter were protected by their contract against barratry of master and crew, and Porter, J., held that the action of the crew amounted to barratry. It was "a wilful act deliberately done and to the prejudice of the owners". It was not necessary that the act should be criminal, or intended to injure, if the act is one which will in fact cause injury. Barratry.

The decision of Porter, J., that the Carriage of Goods by Air Act, 1932, did not apply to a contract for the carriage of gold from this country to Belgium because at the time of the carriage Belgium had not ratified the Warsaw Convention was upheld by the Court of Appeal (*Philippson* v. *Imperial Airways, Ltd.* (1938), 54 T. L. R. 528), but has now been reversed by the House of Lords ((1939) 55 T. L. R. 490). (See *Annual Survey*, 1937.) Warsaw Rules.

Studebaker Distributors, Ltd. v. *Charlton S.S. Co., Ltd.* (1938), 54 T. L. R. 77, raised interesting points under the United States Harter Act. According to this Act, which corresponds to some extent with the Carriage of Goods by Sea Act, 1924, "any clause relieving the shipowner from liability for loss arising from negligence, fault or failure in proper loading or stowage" is to be void. In the instant case the contract of carriage contained a clause by which a certificate by a surveyor of the Board of Underwriters of New York should be accepted as conclusive evidence of proper stowage. Goddard, J., held this to be repugnant to the Act; the carrier cannot escape by means of a third party opinion, the Court must judge. He also held that an unpacked motor car was not a "package" within the meaning of a clause relating to the value of each package shipped. Harter Act.

Elof Hansson Agency, Ltd. v. *Victoria Motor Haulage, Ltd.* (1938), 54 T. L. R. 666, raised a very interesting point London lighterage clause.

in the application of the general principles of contract to a contract of carriage. Lighterage on the Thames is carried on on the terms of the well-known London Lighterage Clause, of which the Courts have judicial notice, and by the terms of which every goods owner who employs a Thames lighterman is deemed to be bound. The plaintiffs instructed the defendants to take delivery of some goods from a vessel lying in the Thames, and the defendants employed a lighterman to do so. The latter used an unseaworthy barge, as a result of which the plaintiffs suffered damage. About three months before the contract was entered into the London Lighterage Clause had been amended so as to exclude liability for unseaworthiness, but the plaintiffs were unaware of the alteration, nor were the terms of the London Lighterage Clause in any way brought to their attention. In these circumstances Singleton, J., while holding that the plaintiffs were bound by the terms of the clause as it existed prior to 1937, refused to read the amended clause into the contract, and decided that the defendants were liable. It would be interesting to know at what stage parties will become bound by an altered standard contract of this kind.

Effect of mate's receipt.

Nippon Yusen Kaisha v. *Ramjiban Serowgee*, [1938] A. C. 429, is an interesting case from several points of view (see also p. 250). Here we are concerned with the mate's receipt, the document issued to the consignor of goods on shipment as a receipt, and against surrender of which the bill of lading is normally delivered. In the instant case the goods in question had been bought by the respondent from the manufacturers, and resold to an exporting company which made arrangements for their carriage by the plaintiffs. The ship having been nominated the manufacturers shipped the goods, and handed the mate's receipt which they then obtained to the respondents against payment of the price. Meanwhile, however, the exporting company had induced the plaintiffs to issue direct to them bills of lading in respect of the goods. The respondents later presented their mate's receipt and demanded bills of lading. On discovering what had happened the respondents required the plaintiffs not to deliver the goods to the bill of lading holders, to whom they had meanwhile been transferred by the exporting company. The Privy Council, however, following *Hathesing* v. *Laing* (1873), L. R. 17 Eq. 92, held that there was no duty on the shipowner to issue the bills of lading to the holder of the

mate's receipt, and that the appellants were therefore not liable. From the mercantile point of view this establishes a very unfortunate position, and it would appear desirable that the holder of the mate's receipt should alone have the right to the bill of lading.

Shipowner's obligation to inform charterer of deadweight capacity.

Kawasaki Kisen Kabushiki Kaisha v. *Bantham Steamship Co., Ltd.*, [1938] 2 K. B. 790, involved the question whether a shipowner whose ship had been chartered on terms that the hire was payable on actual deadweight capacity was under the obligation to inform the charterer as to the deadweight capacity, or whether it was the charterer's obligation to ascertain this from the shipbuilder—the ship at the time of the charterparty being still under construction. The Court of Appeal took the former view. See p. 282, *supra*, where the general question of implied obligations of this type is considered.

Deviation.

By reversing the decision of Goddard, J., in *Reardon Smith Line, Ltd.* v. *Black Sea and Baltic General Insurance Co.*, [1938] 2 K. B. 780, the Court of Appeal added one more to the long list of extremely technical decisions on deviation. The charterparty provided that the vessel should proceed from Poti in the Black Sea to Istanbul, and thence to a transatlantic port. It had become a common practice for vessels going from Poti on long voyages *via* Istanbul to call at Constanza for oil bunkers. Goddard, J. (see *Annual Survey*, 1937, p. 213) held that this was not a deviation, since it was an ordinary commercial route. The Court of Appeal by a majority (Greer, L.J., dissenting) held that the words "Poti to Istanbul" indicated a direct voyage, and that it was therefore immaterial to show what was the commercial practice. It is interesting to observe how two Judges (Slesser and Clauson, L.JJ.), whose professional experience has lain in spheres quite other than those of maritime law, can owing to the accidents of organisation override the opinions of experienced mercantile lawyers such as Greer, L.J., and Goddard, J. (now L.J.).

The majority in the Court of Appeal based their decision mainly on technical construction and rules of evidence. They held that since the route was described in the charterparty as from Poti to Istanbul this must be construed as meaning the ordinary practicable sea track which was substantially in a direct line. Evidence as to the growth of the custom to use an alternative route was on this view inadmissible, being

incompatible with the result of the construction of the document in accordance with the usual canons. This question of evidence is considered further at p. 339.

Frustration.

Reference should be made to two important cases concerning the frustration of contract which arose out of charterparties, *viz.*, *W. G. Tatem, Ltd.* v. *Gamboa*, 43 Com. Cas. 343, and *Gulnes* v. *Imperial Chemical Industries, Ltd.*, 54 T. L. R. 194. See above under Contract, p. 165.

Company Law

Corporate entity.

The decision in *Barnes* v. *Hely Hutchinson*, mentioned in the *Annual Survey*, 1937, p. 216, now reported [1938] 1 K. B. 469, was affirmed by the Court of Appeal, [1939] 1 K. B. 98. The judgment of the Master of the Rolls contains a valuable explanation of the principle governing the taxation of company profits and of the rule that "the revenue is not entitled to put its hands into the same bag more than once, and the bag is regarded as keeping its identity until its contents are finally divided". Scott, L.J., put the matter in a nutshell when he observed, "that income tax law of to-day thinks of a company as a body of persons, and of the shareholders as corporators having a direct interest in the capital and income of their corporation, almost as if the Income Tax Act had been passed in 1818 and not in 1918". The corporate entity concept, so rigidly upheld in the sphere of private law, is almost thrown overboard in income tax law and (*per* Clauson, L.J.) "for the purposes of the [Income Tax] Acts the profits or gains of a company, even though it be a corporation and as such an entity separate from its shareholders, are to be treated as the profits and gains of the members of the corporation".

In *Inland Revenue Commissioners* v. *Cull*, [1938] 2 K. B. 109, the Master of the Rolls also pointed to the "fundamental antinomy" that income tax legislation treats the circumstance of incorporation as irrelevant, and that a dividend paid by a limited company to its members is taxed as if it were a share in the profits of a joint undertaking. The case itself illustrates the practical difficulties arising from this "antinomy". It was held by the Court of Appeal that a dividend paid to a shareholder "without deduction of income tax" had to be "grossed up" for surtax purposes.

Collins v. *Adamson*, reviewed in the *Annual Survey*, 1937, p. 216, is now reported [1938] 1 K. B. 477.

Section 21 of the Finance Act, 1922, tries to prevent tax avoidance by providing in certain cases for the treatment of undistributed company income as income of the members for purposes of surtax assessment. In *Inland Revenue Commissioners* v. *Tring Investments, Ltd.*, [1939] 1 All E. R. 148, it was held that an unqualified option to acquire shares makes an individual a member for the purposes of this provision, *i.e.*, a person "having a share or interest in the capital or profits or income of a company". The case is most instructive as an illustration how the machinery of one-man companies with preferred, ordinary and deferred shares is put to the service of large taxpayers for tax-saving purposes. The objects of the provision in the Finance Act, 1922, and of section 20 of the Finance Act, 1936, which extends its operation to income used for the repayment of debenture-holders and other loan-creditors, are fully described by the Master of the Rolls in *Inland Revenue Commissioners* v. *Kered, Ltd.*, 160 L. T. 152.

It was held by Morton, J., in *Frinton and Walton U. D. C.* v. *Walton and District Sand and Mineral Co., Ltd., and another*, 54 T. L. R. 369, that a company cannot appear "in person" before the Court, and must, therefore, be represented by counsel. A director appearing as such is not "the company in person".

Parent and subsidiary.

"Companies who . . . choose to carry on their businesses with the assistance of subsidiaries not infrequently find that for taxation purposes certain inconveniences result, owing to the fact that their subsidiary is a taxable entity separate from themselves." These words were used by the Master of the Rolls in *Odhams Press, Ltd.* v. *Cook*, [1938] 2 All E. R. 312, and on appeal, [1938] 4 All E. R. 549. Odhams Press, Ltd. had a trading account with one of its subsidiaries which published a periodical and for which Odhams did all the printing. An attempt was made to deduct for income tax purposes from the debt the annual loss of the subsidiary which was covered by the parent, but it was held that the support thus given by the parent to the subsidiary could not be regarded as being laid out exclusively for the parent's own trade and could, therefore, not be deducted.

Does a parent company which controls a subsidiary company, and, after dissolution of the subsidiary, acquires

its business, "succeed" to the trade carried on by the subsidiary within the meaning of income tax legislation? Two cases decided in the current year would seem to show that the "corporate entity" concept does not assist us in the solution of this question. In *Laycock* v. *Freeman, Hardy and Willis, Ltd.*, [1938] 2 K. B. 836, and, on appeal, 160 L. T. 41, the parent was a retail firm and the subsidiaries were manufacturers and wholesalers selling the whole of their output to the parent company. By acquiring the business of the subsidiaries and continuing the manufacturing process in its own name, the parent did not "succeed" to the subsidiaries' trade. What had been two concerns assessable to separate profits before amalgamation became one concern after the disappearance of the subsidiaries as separate corporate entities. By manufacturing the goods hitherto produced by the subsidiaries and continuing to be sold by the parent retail company, the parent did not itself become a manufacturer or wholesaler. But where, as in *Briton Ferry Steel Co., Ltd.* v. *Barry*, [1938] 4 All E. R. 429, the parent is a manufacturing company and takes over the more advanced stage of the manufacturing process hitherto carried on by a subsidiary, it acquires a new trade and succeeds to the subsidiary's business, although the ultimate sale of the finished products is—before and after the amalgamation—in the hands of another subsidiary of the same parent company.

Effect of Articles.

By the Companies Act, 1929, s. 20, the articles of association constitute a contract between the company and each member and between the individual members. But they do not confer rights, or impose duties, on outsiders, such as, for example, the company's directors, and a person who happens to be a member cannot derive any right from the articles in any capacity except as a member, and not, for instance, as a director. This important principle was reaffirmed by the Court of Appeal in *Beattie* v. *E. and F. Beattie, Ltd.*, [1938] Ch. 708. A member of a private company who held half of its shares sued the company and another shareholder and director on the ground that certain moneys belonging to the company had been wrongfully paid to the defendant director and should be refunded to the company. The defendant director applied for a stay of the action on the ground that the articles of association contained an arbitration clause which covered this case. The Court of Appeal held that there was no written agreement for sub-

mission to arbitration. The arbitration clause in the articles could not be invoked by the defendant when sued as a director because in this capacity he was not a party to the articles as a contract. "The contractual force given to the articles of association . . . is limited to such provisions of the articles as apply to the relationship of the members in their capacity as members": *per* Greene, M.R.

Calls.

From the point of view of the protection of a company's creditors the payment of calls otherwise than in cash is one of the gravest dangers. Yet, such payment is permissible and the Courts will not in general examine the adequacy of the consideration. Only in some exceptional cases will an agreement for payment of calls otherwise than in cash be void, *e.g.*, if the consideration is "illusory" or if on its face it does not cover the nominal amount due for calls. *Re White Star Line, Ltd.*, [1938] Ch. 458, was such a case. The Royal Mail Co. was one of the principal shareholders of the White Star Line, Ltd. and also its creditor. In 1931 the two companies arrived at an agreement by which the Royal Mail purported to pay its specialty debt on calls by issuing to the White Star "deferred creditors' certificates" conferring on the White Star a postponed right to the capital money of the calls coupled with a right to interest payable only out of certain profits and with a limited control of the Royal Mail's affairs. The value of these certificates was at all material times lower than the nominal amount of the calls due. The Court of Appeal held that the agreement amounted to a release of part of the Royal Mail's debt on calls and that it was, therefore, *ultra vires* the White Star Line and void. The invalidity of the agreement was capable of being raised by the liquidator of the White Star as a defence against a proof by the liquidators of the Royal Mail for the debt owing to that company by the White Star, and the Court of Appeal affirmed the rule that a creditor cannot receive a dividend in a compulsory liquidation as long as he remains liable to contribute to the fund available for distribution. It would have been an unnecessary technicality to force the liquidator of the White Star to bring a separate action in order to establish the invalidity of the 1931 agreement and the Royal Mail's liability to contribute to the White Star's assets.

Lien on shares.

A lien upon shares for debts and liabilities of the shareholder to the company, such as is created by many articles

of association (see also Table A, Art. 7) is an "equitable charge" within the meaning of section 85 of the Administration of Estates Act, 1925. It was held on this ground in *Re Turner, Tennant* v. *Turner*, [1938] Ch. 598, that, as between himself and the estate, a legatee taking such shares is liable to pay a proportionate amount of the debt secured by the lien.

Forfeiture.

The decision of the Judicial Committee in *Devi and Others* v. *People's Bank of Northern India, Ltd. (in liquidation)*, [1938] 4 All E. R. 337, is a reminder that "in the matter of the forfeiture of shares, technicalities must be strictly observed, and it is not, as is sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture, for the forfeiture of shares may result in a permanent reduction of the capital of a company": *per* Lord Romer. In March 1932 the directors made two calls of 20 per cent., 10 per cent. being payable in April and 10 in May 1932. The company was then in the course of reconstruction, and in November the Court sanctioned an amended scheme of arrangement by which further calls were not to exceed 25 per cent., including the 20 per cent. already called, and that these 25 per cent. calls were payable in five half-yearly calls starting from July 1, 1932. The directors called another 5 per cent., but paid no attention to the dates laid down in the scheme, and declared shares forfeited on the ground that the calls had not been paid at the dates originally fixed. It was, however, *ultra vires* the company to vary the terms of the scheme, and neither the resolution of the directors nor an alleged ratification by the shareholders (which in fact had not taken place) could give validity to forfeitures at variance with the scheme. The shareholders whose names had been deleted from the register of members were, upon application by the liquidator, placed upon the list of contributories.

Directors and other officials.

The main importance of *Re Cleadon Trust, Ltd.*, [1938] Ch. 660, and, on appeal, [1939] Ch. 286, will probably be found to lie in the spheres of the law of quasi-contract and "unjust enrichment". Yet the decision also affects vital points of company law. The transactions before the Court concerned three companies, a parent and two subsidiaries, and the shareholder controlling the parent company. Almost the whole of the share capital of the subsidiaries was in the hands

of the parent, which also held debentures issued by the subsidiaries and shared with them the same board of directors, secretary and registered office. On a number of occasions the controlling shareholder paid to outside creditors debts owing by the subsidiaries which they were unable to meet but which had been guaranteed by the parent company. He did so upon request by the secretary, but the secretary had no authority to make this request on behalf of the parent company. There was no board of directors capable of entering into a contract with the controlling shareholder on behalf of the company, because the articles provided for a quorum of two independent directors at each board meeting, and the company had two directors only, one of whom was the controlling shareholder who was interested in the matter. When the three companies were wound up,—the subsidiaries being insolvent,—the controlling shareholder proved against the parent for the repayment of the moneys so advanced, a claim which was rejected by the liquidator, whose decision was upheld by Bennett, J., and a majority of the Court of Appeal. In the absence of an independent board the parent company, as a juridical *persona*, could not act at all. "It was", in the words of Scott, L.J., "still the outer shell of a *persona*, but it was paralysed, and could neither request nor agree nor instruct nor authorise. In short, it could not do anything within the sphere of management of the company's business. It was the negation of a real person. . . ." There could, therefore, be neither an express nor an implied contract between the claimant and the parent company for the advance of these moneys though he had been credited with the amounts in the company's books. He was thus thrown back on those principles of law and equity which, in certain circumstances, enable a person paying another's debts to recover the money in the absence of a contract. This was the principal feature of the case, and its interesting aspect from the point of view of company law was the distinction drawn between moneys advanced to the parent (which, even in the absence of a valid request the claimant was undisputedly entitled to recover) and those paid to the subsidiaries' creditors. The parent company derived a benefit from these payments, because they relieved it of the burden of its guarantee and enhanced the subsidiaries' assets available to meet the debentures held by the parent. The claimant argued that an equity was raised in his favour

against the parent by the mere fact that the payment of the subsidiaries' debts had thus enured for the parent's benefit, though, in the absence of an independent board, there had been no valid request to make these payments, and the benefit had been "unsought". The majority of the Court of Appeal rejected this contention, and the controlling shareholder was thus caught in the meshes of his own net of one-man and two-men companies. The *dicta* of Scott, L.J., about the duties of directors of such companies are noteworthy, and so are the remarks made in his dissenting judgment by the Master of the Rolls about *ultra vires* borrowing.

A fraudulent director induces a *bona fide* customer of the company to pay by cheque made payable to the director's order, and absconds with the money. Is the customer's debt to the company discharged? Under the rule in *Turquand's Case* it depends on the articles of association whether the customer is entitled to assume that the director is authorised to receive payment for the company. If, as in *Clay Hill Brick and Tile Co., Ltd.* v. *Rawlings*, 159 L. T. 482, the articles enable the directors to delegate to any of their number any of their powers and authorities, the customer may assume that the delegation has taken place and may pay the director. But may he also assume that the director is authorised to receive payment in a form which, one would have thought, is bound to arouse suspicion? Tucker, J., thought that the case was comparable to that of a selling agent receiving payment for his principal by cheque made out to the agent's order, and that, therefore, the customer's debt was discharged, but it would seem that this decision was based on the very peculiar facts of the case. In normal circumstances it is difficult to see that the case of the company director necessarily stands on the same footing as that of the selling agent who may settle periodical accounts with his principal, and, perhaps, deduct a commission.

Though not itself a decision on company law, *Uxbridge Permanent Benefit Building Society* v. *Pickard*, [1939] 1 K. B. 266, is bound to have some influence on the rules governing the liability of companies for forgeries and frauds committed by secretaries and other officials. It was emphasised by Atkinson, J., that neither *Ruben and Ladenburg* v. *Great Fingall Consolidated*, [1906] A. C. 439, nor *Kreditbank Cassel G.m.b.H.* v. *Schenkers*, [1927] 1 K. B.

826, yielded a rule freeing a company from liability for forgeries committed by a secretary or manager within his ostensible authority. The explanation of *Ruben's Case* was that the certificates bearing the forged signatures were a nullity, and both in *Ruben's* and *Schenker's Case* the company's official was not acting within his apparent authority.

Reconstruction and amalgamation.

Of the various methods of company "reconstruction" provided for in the Companies Act the procedure under section 153 has this peculiar characteristic—that it does not presuppose the opening of winding-up proceedings. The directors of an insolvent company may, if they obtain the consent of the necessary three-fourths majority of the creditors and that of the Court, avoid a liquidation by coming to an arrangement. This was what the directors of the company tried to do in *Re Oceanic Steam Navigation Co.*, [1939] Ch. 41. A new company was to be formed by the creditors which would take over and realise for the creditors' benefit all the assets of the insolvent company. Simonds, J., held that it was no valid objection to a scheme of this kind that the shareholders did not get any benefit under it and that no regard had been paid to their wishes. Yet the Court had to refuse its consent as the memorandum did not contain a power to sell the assets *en bloc*, and nothing which is *ultra vires* the company can be done under section 153. This latter point is more interesting from a theoretical than from a practical point of view, since most memoranda nowadays provide for a power to dispose of the undertaking as a whole.

The decision in *Lever Brothers, Ltd.* v. *Inland Revenue Commissioners*, reviewed in the *Annual Survey*, 1937, p. 222, which concerns the stamp duty payable in connection with company amalgamations, is now reported [1938] 1 K. B. 314, and was affirmed by the Court of Appeal: [1938] 2 K. B. 518.

Nokes v. *Doncaster Amalgamated Collieries, Ltd.*, [1939] 1 K. B. 70, will deserve a footnote in future editions of text-books on jurisprudence. Two colliery companies had been amalgamated by an order of the Court under the Companies Act, 1929, s. 154. Pursuant to section 154 (2) and (4) all the property, rights and powers of the transferor company had been made to vest in the transferee company. A miner

who had been in the service of the transferor company and continued to work for the transferee after the amalgamation without being aware of the amalgamation order, absented himself from work for one day. The transferee company claimed damages from him, and the question at issue was whether there was any contract between the parties capable of being broken by the defendant. This question was answered in the affirmative by the King's Bench Division, and it was held that a transfer of a contract for personal services is brought about by an order under section 154, the words "rights and powers" in section 154 (4) being wide enough to cover rights arising out of such contracts. The decision undoubtedly serves what Charles, J., called the "continuity of business"—it is perfectly logical, though it is somewhat startling to find that the law is capable of forcing upon an employee a new employer whom he never agreed to serve.

Winding-up.

A majority of the shareholders which does not dispose of three-fourths of the voting power is not in a position to force a liquidation upon the minority, unless the company is insolvent or there is some special reason which makes the winding-up "just and equitable". That the scope of the "just and equitable" clause in the Companies Act, 1929, s. 168, though no longer subject to the *ejusdem generis* rule, is very restricted indeed, is well illustrated by *Re Anglo-Continental Produce Co., Ltd.*, [1939] 1 All E. R. 99. A petition of a company for its own compulsory winding-up which was supported by the majority was dismissed by Bennett, J. The relationship between the two groups of shareholders was obviously strained, but the difficulties did not amount to a "deadlock", and neither the wish of the majority, nor the fact that the company's business had been carried on for some years at a loss, was sufficient to justify a winding-up order. Bennett, J., was of the opinion that the "just and equitable" clause could only operate in cases of fraud on the minority, loss of substratum, or real deadlock.

In the course of a winding-up the Court has very wide powers to summon before it and to examine a third person, and such a person may be required to produce any books and papers in his custody or power relating to the company. This jurisdiction, available in the case of a compulsory (section 214) as well as a voluntary (section 252) liquidation,

is, as Simonds, J., pointed out in *Re Maville Hose, Ltd.*, [1939] Ch. 32, of an "inquisitorial" character, and must, therefore, be exercised with great care, so as "not to allow the section to be oppressive as between the company, on the one hand, and a third party, on the other hand, against whom it is proposed, and indeed contemplated, that hostile action may be taken". Company B, being associated with company A, which was being wound up, had received two debentures from company A and given a guarantee of moneys which might become due from company A. A director of company B was summoned before the Registrar by the liquidator. He was required to produce not only the debentures and guarantee, but also further documents showing the payment of the money advanced to A and even the state of B's account with a third company. This part of the order was discharged upon the motion of the director of B, because it was oppressive to order a third party against whom a hostile claim is made to produce a number of documents some of which may be privileged, especially before the examinee had been questioned. The examinee was entitled to raise this point by way of motion to discharge the Registrar's order, and it was not incumbent on him to appear and refuse to comply with the order to produce, thus exposing himself to the risk of committal or attachment. The intricate point whether a director of a company can be said to have in his custody or power the books or papers belonging to his company remained undecided.

Share pushing.

The Companies Act, 1929, s. 356, makes it a criminal offence to go from house to house offering debentures for subscription or purchase by the public. In *R.* v. *Findlater*, 160 L. T. 182, the documents offered by house-to-house canvassers were called "founders' units". They gave their holders for twenty-one years a right to an annual share in the company's profits, amounting to not less than 10 per cent. of the capital subscribed, and a right to a capital sinking fund bond to be issued by a reputable insurer, guaranteeing the return of the capital after twenty-one years, the premiums to be payable by the company. The Court of Criminal Appeal held that the founders' units were debentures, as the liability undertaken by the company was "only consistent with the acknowledgment of an existing debt".

Insurance

Life Assurance

Causa proxima.

The *causa proxima* rule is applied less strictly in life assurance than in marine insurance and the law of carriage. A good illustration is *Smith* v. *Cornhill Insurance Co., Ltd.* (1938), 54 T. L. R. 869. The policy covered death occurring from accident "and as the result solely of bodily injury caused by violent accidental external and visible means sustained by the insured whilst riding in the insured car". The insured's car left the road and fell into a ravine, as a result of which she sustained severe head injuries resulting in serious damage to her brain. She wandered about in a semi-conscious condition and eventually fell into a stream. The shock of this caused her to die of heart failure. It was contended that her death was not the result of the motor-car accident but of falling into the stream. Atkinson, J., however, held that death was the direct and uninterrupted result of the original accident.

Assurance Companies Act, 1909.

The Assurance Companies Act, 1909, contains somewhat complicated provisions designed to ensure that an insurance company carrying on more than one sort of business shall keep the receipts coming from any one kind of business in a separate fund, which shall form a security for the policy-holders of the class in question. The proper construction of these sections has given rise to some discussion in the text-books. In *Re the London General Insurance Co., Ltd.* (1938), 54 T. L. R. 1121, Bennett, J., had to deal with the claims of various classes of creditors on the winding-up of a company which had been doing more than one kind of insurance business. He held that *prima facie* the various classes of creditors share *pari passu* in the general assets, but that in so far as any particular assets can be traced as belonging to the funds required to be kept under the terms of the Act the policy-holders in respect of that class of insurance have prior claims upon it. Apparently the burden of proof is upon a particular class of claimants to show that the asset in question is properly so traced.

Suicide: effect of.

The House of Lords unanimously affirmed the decision of the Court of Appeal in *Beresford* v. *Royal Insurance Co., Ltd.*, [1938] A. C. 586 (see *Annual Survey*, 1936 and 1937).

The result is that it is now clear that the personal representatives of a person who having insured his life commits suicide cannot recover upon the policy even when it contains a clause providing that they may do so. Such a clause is contrary to public policy, because it would enable the insured to benefit by his own criminal act. The question whether a person who has taken such a policy by assignment for valuable consideration is in a better position is, as has been pointed out (see 1 *Mod. Law Review*, p. 154) of considerable importance. It cannot be regarded as settled, for while in the present case Lord Atkin expresses the opinion (*obiter*) that under a properly drafted clause an insurance company would be liable to such an assignee, a view with which Lord Russell apparently concurs, Lord Macmillan reserves his opinion on the point.

Marine Insurance

Constructive total loss.

The subject of constructive total loss has been causing much difficulty of recent years in connection with freight insurances (see *Annual Survey*, 1936). *Petros M. Nomikos, Ltd.* v. *Robertson*, [1938] 2 K. B. 603, is of considerable importance not only in this connection, but for some of the views expressed in the Court of Appeal on the general nature of a constructive total loss which suggest that the generally accepted views on this subject may be incorrect. The plaintiffs had a policy on freight, chartered or otherwise, with the defendant underwriter. This policy incorporated the Institute Time Clauses—Freight, clause 5 of which provides as follows: "in the event of the total loss whether absolute or constructive of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered". The vessel in question sustained a casualty on which the plaintiffs would have been entitled to abandon her to the insurers as a constructive total loss. Since the date of the policy, however, her value had increased substantially, and it paid the plaintiffs to have her repaired rather than to abandon her, and they accordingly pursued this course. Afterwards they made a claim on the freight policy under the above clause 5.

The underwriters resisted payment on the ground that since the vessel had never been abandoned to them or notice

of abandonment given the vessel had never been a constructive total loss. This view was accepted by Goddard, J., in the Court of first instance. The Court of Appeal reversed this decision, taking the view that the parties had by the terms of their contract provided for the conditions on which the insurers should become liable for freight, and that these conditions had been, on the proper construction of the contract, satisfied.

The Court of Appeal, however, inclined strongly to the opinion that abandonment is not an essential feature of a constructive total loss, but just a condition which has to be performed before a claim can be effectively made against underwriters (see especially *per* Greer, L.J., at pp. 620–1). Certain provisions of the Marine Insurance Act, 1906 (*viz.*, section 60 (2) (ii), and section 61), seem to support this opinion though it is not in accord with the traditional view. This is that a loss falling short of an actual total loss may nevertheless in certain circumstances be treated, or construed, as such a loss, when certain conditions are satisfied. Among these it has generally been thought were those of abandonment of the subject-matter to the insurer, together with notice thereof, within a reasonable time.

Motor Vehicle Insurance

The most interesting cases in connection with this subject continue to arise from the provisions of the Road Traffic Acts, 1930 and 1934, relating to compulsory insurance against third party risks. A substantially larger number of reported cases now fall under the head of motor vehicle insurance than under any other.

Uninsured bailee.

In *Daniels* v. *Vaux*, [1938] 2 K. B. 203, an interesting attempt was made to persuade the Court to apply the important doctrine of *Monk* v. *Warbey*, [1935] 1 K. B. 75 (see the *Annual Survey* for 1935). In that case the owner of a motor car had lent it to two impecunious persons under such circumstances that his insurance policy did not cover them. The bailees were so negligent in the management of the car that the plaintiff was injured. He was unable to recover damages from them, and sued the defendant for breach of his statutory duty under the Road Traffic Act, 1930, to have his car so insured that a person injured by the driving of it would have an insurer to fall back upon.

He was held entitled to recover. In the instant case the defendant had lent her car to her son leaving him to pay the insurance premium which he had failed to do. Owing to his negligence the plaintiff was injured. A claim was made against the son and was on the point of being compromised when the son died, and the right of action was thereby lost. In these circumstances Humphreys, J., held that the plaintiff's loss was not caused by the defendant's breach of statutory duty in failing to keep her car properly insured, but to his failure to initiate proceedings against the negligent son.

Procedural difficulties.

This legislation has also given rise to a number of procedural difficulties which are of more than technical interest and some of which are discussed at p. 343, *infra*, under *Windsor* v. *Chalcraft* (1938), 54 T. L. R. 834, and *Cross* v. *British Oak Insurance Co., Ltd.*, [1938] 2 K. B. 167.

Compulsory third party insurance.

General Accident Assurance Corporation, Ltd. v. *Shuttleworth*, 60 Ll. L. Rep. 301, serves to underline one of the important gaps in the scheme of compulsory third party insurance created under the Road Traffic Acts, 1930 and 1934. The statutes do not sufficiently describe the risks which are to be covered, and the policy may be so drawn that if, as in the instant case, the driver does not hold a driving licence or has held and is disqualified from holding such a licence, the cover does not attach. In these circumstances the injured third party has no redress if the driver turns out to be insolvent. There is obviously a wide range of possible similar qualifications upon the validity of insurances, and insurers are more and more likely to make use of them since the financial conditions in the market are difficult.

Reference may also be made to *Peters* v. *General Accident Fire and Life Assurance Corporation, Ltd.* (1938), 54 T. L. R. 663. Here the accident was caused by the driver of a car, which he had purchased second-hand, receiving at the same time the insurance policy and registration book. Apparently he thought that he thereby became insured. It is quite clear, and was so held by the Court of Appeal, that a policy of motor vehicle insurance is not assignable. It was argued that since the policy covered any person driving the car with the permission of the insured, the insurer was liable in the circumstances. The answer is obviously that the owner of a car does not drive it with anybody's permission. It is becoming more and more clear that the existing system of

compulsory insurance to cover third party risks is ineffective. (See *Modern Law Review*, vol. 2, p. 36.)

Sale and Hire Purchase of Goods

Acceptance under s. 4.

One of the methods provided in section 4 of the Sale of Goods Act, 1893, for getting the necessary evidence without which a contract of sale is unenforceable is "acceptance and actual receipt of the goods or part of them". It is well known that "acceptance" is given a peculiar meaning by section 4 (3), *viz.*, an act in relation to the goods which recognises a pre-existing contract. The difference between this and acceptance under section 35, which is concerned with the passing of the property, has often been noticed. In *Re A Debtor* (*No. 38 of 1938*), 55 T. L. R. 107, the debtor had ordered certain goods orally and these had been delivered to one of his workmen, who took them in without the debtor's knowledge. It was contended that the workman had no authority to recognise a pre-existing contract, and that therefore there had been no acceptance. A Divisional Court held, however, that the goods had remained so long on the debtor's premises that there had been an acceptance within section 35 (lapse of reasonable time without intimation of rejection). They considered that an acceptance within section 35 must be sufficient to satisfy section 4 (3) and that therefore the contract was enforceable.

Right of rejection.

Wilensko Slaski Towarzystwo Drewno v. *Fenwick & Co., Ltd.*, 44 Com. Cas. 1, is only of interest, apart from the unpronounceable name of the plaintiffs, because it shows that the well-known clause appearing in wood goods contracts by which the buyers are not to reject the goods if they are not in accordance with the contract is still used and relied upon by sellers notwithstanding the numerous cases in which it has been declared by the Courts to be of no avail (see *Annual Survey*, 1930). In this case the clause was slightly different, containing the words "nor any part of them". In the opinion of Lewis, J., these additional words make no difference.

Bessler Waechter, etc., Ltd. v. *South Derwent Coal Co., Ltd.*, [1938] 1 K. B. 408; 43 Com. Cas. 86, adds one more to the long list of cases concerning the written memorandum under section 4 of the Sale of Goods Act, 1893. The plaintiffs

at the request of the defendant buyers had forborne to make deliveries of goods sold during the period provided for deliveries under the contract of sale. It was held that there was no need for this arrangement to be evidenced in writing.

Distress for rent.

The Law of Distress Amendment Act, 1908, makes articles, which are upon a tenant's premises under a hire-purchase agreement, subject to the landlord's distress for rent. Ever since that date those in the hire-purchase business have been attempting to find a way round the Act by the insertion in the agreement of a clause automatically avoiding it upon a distress by the landlord. Until 1929 in *Smart Bros.* v. *Holt*, [1929] 2 K. B. 303, the Courts keeping their eyes firmly upon the intention of the Legislature as shown by the Act of 1908 rejected these efforts (see especially *Jay's Furnishing Co.* v. *Brand & Co.*, [1915] 1 K. B. 458). Eventually, however, a form of words was devised which a Divisional Court (in *Smart's Case*) was prepared to hold took the goods out of the statute. In *Times Furnishing Co.* v. *Hutchings*, [1938] 1 K. B. 775, Humphreys, J., while following *Smart's Case* on the point of the automatic termination of the hire-purchase agreement by the landlord's distress, was able to avoid the consequence of that decision by finding that the goods in question were "in the possession, order or disposition" of the tenant under such circumstances that he was "the reputed owner", and for that reason were not exempt from the landlord's right of distress (see the Law of Distress Amendment Act, 1908, s. 4 (1)). The hire-purchase industry will accordingly have to take up once more the task of finding a way round the statute.

Warranty of title on hire purchase.

In *Mercantile Union Guarantee Corporation* v. *Wheatley*, [1938] 1 K. B. 490, Goddard, J., explained the judgment in *Karflex, Ltd.* v. *Poole*, [1933] 2 K. B. 251, to which he was a party, and which has been adversely criticised (see *Annual Survey*, 1933). According to that case, as it is reported, a person who lets goods on hire purchase undertakes that he is the owner at the time of the letting and is in a position to pass a title as at the time when the agreement of hire purchase is entered into. In the instant case, however, Goddard, J., explained that the case of *Karflex, Ltd.*, was decided on its facts and that normally the implied undertaking by the person who lets out the subject-matter of the agreement is that he will be the owner and will be able to pass a title at the date of delivery of the article. This is a very different kettle of

fish, but it is submitted that even as qualified the decision is wrong, and that the provisions of the Hire-Purchase Act, 1938, under which (section 8 (1)) the undertaking relates to the time at which the property is to pass more accurately set out the common law.

Minimum purchase price.

Associated Distributors v. *Hall*, [1938] 2 K. B. 83, is of interest as the first reported case on "the minimum purchase price" clause in a hire-purchase agreement. This is a clause designed to safeguard the owner against loss due to the depreciation of goods returned to him by the hirer, and which usually provides that the owner shall receive altogether at least half the total price. In the instant case the hirer returned the goods after paying only one instalment, and when sued in the county court under the "minimum purchase price clause" he contended that the clause imposed a penalty, a contention accepted by the county court Judge. The Court of Appeal, however, considered that he had misconceived the nature of the payment, which is in effect the price of an option to terminate the hiring. It may, perhaps, be added that the Hire-Purchase Act, 1938, s. 4 (3) stabilises this clause on such a basis that the owner will not receive more than half the purchase price altogether.

Passing of property.

Nippon Yusen Kaisha v. *Ramjiban Serowgee*, [1938] A. C. 429, which has already been discussed under Carriage, raised an interesting point as to the passing of property. Manufactured goods were sold for delivery to a ship. Normally the property in them would have passed to purchaser and thence to sub-purchaser on shipment (Sale of Goods Act, 1893, s. 18, r. 5). The contract of sale, however, contained a clause reserving the right of disposal, but in a later clause it was provided that the sellers' lien should subsist so long as the mate's receipt was in the possession of the sellers. By what we can only regard as a very technical construction the Privy Council held that, since there is no need for a lien if the property has not passed, the clause reserving the *jus disponendi* could not be taken as preventing the property passing. But since that being the case the sellers had then lost both property and possession there could be no lien in the proper sense, and the sellers obtained a mere equitable right which must be postponed to the superior claims of a *bona fide* transferee of the bill of lading issued under the circumstances described at p. 232. It is suggested that nothing of the sort was in the minds of the parties to

the contract, who by the use of the lien clause were simply intending to increase the safeguards of the *jus disponendi.*

Shipping

Vessels of foreign sovereign.

Reference should be made to the case of *The Cristina* (*Compania Naviera Vascongado* v. *S.S. Cristina*), [1938] A. C. 485. The question involved, *viz.*, whether a vessel requisitioned by a foreign sovereign while lying in a British port can be arrested under a writ *in rem* is really a matter of International Law and is dealt with under that head, also under Conflict of Laws. We may note here that the important question of whether immunity from arrest extends to vessels of a foreign sovereign engaged in trade was very much discussed in the House of Lords. While it was found unnecessary to decide the point the views expressed by the learned law lords show a marked divergence of opinion. Lords Atkin and Wright think that the immunity extends to all the sovereign's interests whether public or commercial, Lords Maugham, L.C., Thankerton, and Macmillan were of the contrary opinion. Incidentally it is difficult to understand why this country has not ratified the Brussels Convention of 1926 which deprives trading vessels of immunity and which has been ratified by most of the other maritime Powers. Lord Maugham expresses approval of the Russian method of owning trading ships through corporations expressly created for the purpose, thus waiving any claim to immunity for them.

Collision: standard of care.

Although essentially a decision on fact the case of the *St. Angus*, [1938] P. 225, may establish an important rule in connection with the navigation of small vessels in crowded waters. The helmsman of the *St. Angus*, a vessel carrying a crew of seven, left the tiller temporarily in charge of the master while absent below for a private purpose. No other member of the crew was on deck and the master suddenly fainted as a result of food poisoning. The ship thereupon swung round and collided with another vessel which sustained damage. In holding that the *St. Angus* was liable Hodson, J., considered that in such waters it was negligent of the master to navigate the vessel even temporarily without any other member of the crew being on deck.

Crossing rules.

The Manchester Regiment, [1938] P. 117, is an instructive case on the application of the overtaking and crossing rules

to a situation in which one of the vessels in collision was steaming about adjusting her compasses.

Duties of buoyage and beaconage authorities.

The Neptun, [1938] P. 21, appears to be the first reported case on the duties of a buoyage and beaconage authority to the vessels using waters in which it operates. The *Neptun* had stranded in the Upper Humber in such circumstances that she became a total loss, and her owners sued the Humber Conservancy Board claiming that their negligence had caused the casualty. There was considerable argument as to what, if any, duty exists on the part of such an authority, and, if there is one, as to its extent, and as to how it is to be formulated in legal terms. In an instructive judgment Langton, J., held that the duty which arises from the receipt of dues is not contractual in character but is analogous to that of a harbour authority, and imposes the same obligation upon the authority towards vessels coming within the waters where it acts, and paying dues to it, as the common law requires from an invitor towards his invitee, namely to exercise reasonable care. What this means in concrete terms is set out at p. 33 of the judgment and need not be repeated here. The learned Judge held as a fact that the defendants had not been guilty of negligence.

Priorities of maritime liens.

The Inna, [1938] P. 148, is worth noticing because it also provides the first direct authority on the point at issue, *viz.*, as to priorities between claimants under a salvage agreement and claimants under a damage lien, for damage which had occurred before the salvage services were afforded. The text-writers had little doubt that the salvors had the precedence, and there was some indirect authority in the cases to the same effect. Merriman, P., had no difficulty in upholding this view. After all, in such a case it is the salvors who prevent the *res* from ceasing to exist.

In this case the value of the *res* when salved came to a good deal less than its owners had agreed to pay to the salvors, and the claimants under the damage lien contended that in these circumstances the salvage agreement should be set aside in their favour. This rather impudent contention met, however, with no sympathy from the learned Judge.

Free port: duties of owner.

Another unusual case is *Firth Shipping Co.* v. *Morton (Earl) Trustees*, [1938] S. C. 177. The defendants were owners of a natural harbour over which they held a grant of port and harbour. The harbour contained a pier, and the defendants collected port dues from ships which lay at the

pier. When tide was low ships at the pier had to lie on the sand, and owing to churning by the propellers of previous vessels a ridge had been formed on which a vessel belonging to the plaintiffs broke her back while lying stranded in the ordinary way. On a claim being made against the defendants they contended that they could not be liable to spend more on the maintenance of the port than the amount of the dues which they received, and that these were inadequate. It was held, however, that whether or not this was sound the defendants were under a duty to vessels using the port to give them adequate warning of the dangers existing, and that having failed to do so in the case of the plaintiffs' vessel they were liable.

Salvage by Crown vessel.

Admiralty Commissioners v. *Valverda*, [1938] A. C. 173 (see *Annual Survey*, 1936 and 1937), is now reported as indicated. The speech of Lord Wright may be referred to for a valuable historical survey of the whole subject of salvage awards, in which he points out how the service has gradually shifted from being regarded as entirely personal to being regarded as largely furnished by the owners of the vessel engaged upon the work.

LITERATURE

General

Law of Competitive Trading. By Dorothy Knight Dix. London: Sweet & Maxwell, Ltd. xx and 224 pp. 15s. net.

This is an interesting and useful book. The author has a clear and entertaining style, and what is more, as appears from the preface, a sense of humour, though she does not find much occasion to give it free play. The work is intended to give a straightforward account of the position from the legal point of view of the commercial man in connection with his competitive trading. This she succeeds in doing. She does not pretend to give any very searching analysis, but her presentation of the main part of her thesis, that dealing with trade interference and price maintenance, is acute, scholarly, and sufficiently detailed for the discussion of all the more important decisions. She displays some knowledge of Dominion and U.S.A. case law which occasionally stands her in good stead. Moreover, though in her introduction

she eschews any ambition to treat of her subject from an economic, or from any other than a legal, point of view, she does in fact provide a useful background of what may be called descriptive economics, and her discussion of price maintenance is carried out in the light of the practice and rules of several of the most important trade associations, such as those in the tobacco and motor trades.

The later sections of the book, those dealing with "Competition at the Hands of Former Employees", which involves restraint of trade, and "Detriment to Goods and Trade Reputation", which involves trade libel and slander of title, are more perfunctory and reach a less high standard. Comparatively few slips have been noticed and these of a kind which will no doubt be rectified in a later edition, which is certainly to be expected.

Legal Aspects of Money. By F. A. Mann. Oxford: The University Press. xxviii and 334 pp. 21s. net.

This valuable work is reviewed under Conflict of Laws since its theme is so largely concerned with the international aspects of money, particularly with the gold clause. The introductory part of the volume is, however, of great interest to commercial lawyers, and covers ground on the borderland of law and economics which has not hitherto been worked over in this country.

Principles of Mercantile Law. By J. Charlesworth. Fourth edition by the Author. London: Stevens & Sons, Ltd. xxxix and 386 pp. 8s. 6d. net.

This is on the whole the most useful elementary text-book on its subject, and the rapidity with which new editions appear bears witness to its popularity. Unfortunately Dr. Charlesworth is rather too content to rest on his laurels, and apart from alterations necessitated by new statutes such as the Law Reform Acts, 1934 and 1935, and a sprinkling of new cases, very little has been done to the book. It is still a little top-heavy in places, *e.g.*, the space given to Bankruptcy as opposed, for example, to Insurance, a topic which has never received proper attention. Some of the illustrations are awkwardly digested, and tend to mislead students: they require careful overhauling. The tendency to use technical terms without explaining them, which is particularly annoying

to commerce students, who use the book a great deal, has not been checked. It is to be hoped that Dr. Charlesworth's well-merited success with this book will not cause him to defer giving it a thorough overhaul in the immediate future.

Stevens' Elements of Mercantile Law. Tenth edition by Herbert Jacobs. London: Butterworth & Co. (Publishers), Ltd. lxviii, 694 and 66 pp. 10s. 6d. net.

The principal feature of the new edition of this valuable students' text-book is a chapter on the Construction of Contracts coming at the end of Part I which deals with the general principles of contract law. This repairs an omission which has been a blemish in the book, and does it very competently. All the more important rules are succinctly set out, and illustrated by a careful selection of cases, and by a number of pertinent quotations from the judgments.

For the rest the incorporation of the Trade Marks Act, 1938, the Air Navigation Act, 1936, and the Law Reform (Married Women and Tortfeasors) Act, 1935, to mention only the more important of the statutes enacted since the last edition, have involved important changes in the text. A number of relevant recent decisions are also referred to, but here Mr. Jacobs' choice is rather erratic, *e.g.*, none of the important recent cases on deviation is referred to, and even in the chapter on Bills of Exchange which always receives most careful treatment there are a few omissions such as *North and South Insurance Corporation* v. *National Provincial Bank*, 52 T. L. R. 71. It is time, too, that a short account of the bankers' documentary credit was inserted, and indeed a rather fuller treatment of the legal position of the banker, which gets a page tucked away in the Law of Agency, would be an advantage. We have suggested before that the Carriage of Goods by Sea Act, 1924, ought by now to have been worked into the general text instead of being treated separately, and this task is still to be performed.

Agency

Digest of the Law of Agency. By William Bowstead. Ninth edition. By A. H. Forbes. London: Sweet & Maxwell, Ltd. xciv and 400 pp. 30s. net.

This is the first edition of this indispensable text-book to appear since the death of the author. Mr. Forbes has not

found it necessary to make many alterations, but he has added a substantial number of cases, and has noted up such of the recent statutes as have a bearing upon the subject-matter of the book. The principal innovation, and a welcome one, is in the appearance of the volume, which, being now printed on a larger page, has been considerably reduced in thickness, which adds to the convenience of handling.

It may not be out of place to pay a tribute here to the excellence of Mr. Bowstead's work, this being his outstanding achievement. He combined great industry with accuracy of scholarship, and his gift for formulating rules of law from the decisions approached that of the late Scrutton, L.J., in his well-known work on Charterparties and Bills of Lading. Mr. Bowstead had not quite such a capacity for compression, and he lacked the historical scholarship of the great Judge. But his work stands out as one of the most important achievements in digesting the common law.

The News Sheets of the League Against Bribery and Secret Commissions, of which a number have been issued during the year, contain much interesting material upon this unpleasant subject. They hardly indicate that the evil is on the wane.

Banking

Law of Banking. By R. S. T. Chorley. London: Sir Isaac Pitman & Sons, Ltd. xxiv and 350 pp. 12s. 6d.

Banking law is of growing importance as a teaching subject. It forms part of the syllabus of those students of commerce who specialise on banking and currency, and it is for their purposes as well as for those of the law students that Professor Chorley's book is written. The book fills a gap between the practical handbooks which make little or no attempt at systematic legal exposition, and the more exhaustive treatises which are too bulky or too advanced to be useful to the average student. The author has well succeeded in steering his boat between the Scylla of over-simplification and the Charybdis of technicality. The student of commerce, provided he has done his more elementary work in the law of contracts and negotiable instruments, will have no difficulty in following the author's line of reasoning, yet the lawyer will find the book stimulating and interesting, as the author does not shun the discussion and full legal analysis

of many controversial points. The most formidable difficulty confronting the writer of a book on any branch of commercial law is the selection of the topics to be dealt with. The systemo-logical categories do not afford any guidance in this respect, and the criteria of selection have to be entirely practical and businesslike: all that is of interest to the banker may be "banking law". Thus Professor Chorley's work touches the law of bailment as well as company law, the principles of agency as well as those of land registration. As the author regards it as his main task to expound the legal aspect of the work done by the big joint stock banks, and by their local branches in particular, more stress is laid on the banker as a borrower than on the banker as a lender, and 108 pages are devoted to the law of cheques, but only 56 to securities for advances. This judicious distribution of emphasis has enabled the author to provide within a narrow compass a text-book from which the junior bank official can gather all the information he wants for his everyday work and which is written in such a way as to clear his mind of any prejudice that law is a "dry" subject.

O. K.-F.

The Banker's Customer. By Maurice Megrah. Second edition by the author. London: Butterworth & Co. (Publishers), Ltd. xv, 192 and 13 pp. 7s. 6d. net.

This volume is a good example of a type of legal literature which may have considerable value, though it usually has little or none: that is, the book written by a person without technical legal qualification, but with an intimate knowledge of the business aspects of the subject with which he deals. Provided that the legal rules have been adequately grasped, such a book may prove of more value to those taking an everyday part in business than a much more scholarly and erudite work. It is here that the usefulness of Mr. Megrah's book lies: that the law is adequately treated appears from the fact that in its original thesis form it was awarded the M.Com. degree.

As to the business, quite a number of topics arising from the relationship of banker and customer but which are not very adequately treated in the average text-book are here dealt with, such as the bankrupt, the trustee, the infant, the lunatic, and the judgment debtor.

Unfortunately Mr. Megrah does not appear to have had

adequate time to do the necessary work of revision in the new edition. *Lloyds Bank* v. *Savory*, [1933] A. C. 201 is left where it was in the Court of Appeal at the time of the first edition, while *Greenwood* v. *Martins Bank*, [1933] A. C. 51, *Harrods, Ltd.* v. *Tester*, 157 L. T. 7, *North and South Insurance Corporation* v. *National Provincial Bank*, 52 T. L. R. 71, and some other important recent cases have been overlooked. In other respects, however, the subject-matter has been adequately brought up to date, as in the case of the married woman customer whose position has been affected by the Law Reform (Married Women and Tortfeasors) Act, 1935.

The Stamp Laws in Relation to Bankers. By G. H. Fender. Second edition. London: Butterworth & Co. (Publishers), Ltd. xvi, 206 and 12 pp. 6s.

That a second edition of this book, the first edition of which we reviewed in the *Annual Survey* of 1936, should have become necessary so soon is certainly a well-deserved tribute. The author has left the book in its previous form, but has brought it up to date in several respects, thus increasing its usefulness to those persons for whom it was written.

Trustee Savings Banks Year Book, 1938. Wyman & Sons, Ltd., Fakenham, Norfolk. x and 284 pp.

This Year Book contains useful information about the growth of the movement, together with articles of general interest.

Carriage

Carver's Carriage of Goods by Sea. Eighth edition. By James S. Henderson and Sanford D. Cole. London: Stevens & Sons, Ltd. cvi and 1131 pp. £2 10s. net.

Mr. Sanford Cole has joined Mr. Henderson in the production of a new edition of *Carver*, and in view of his experience as a text-writer on this subject his appearance in this galley is to be welcomed.

The authority of *Carver* has been recognised for so many years that it seems superfluous to say much about it in this year of grace. Although definitely a text-book it belongs to that scholarly set of volumes which in the later years of the last century began to displace the terrible volumes of an

earlier generation. The history of the matter was studied, if not deeply, at any rate sufficiently to give a feeling of the growth and continuity of the law. Later editions have maintained this reputation, and have not sacrificed the author's practice of discussing the more important cases in some detail, and in the light of quotations from the judgments. For these reasons *Carver* has always been a more readable volume than its more authoritative rival *Scrutton*, whose adoption of the digest method led to a volume which it is almost impossible to sit down and read however vital it may be to consult in practice. On the other hand, the size of the book has for the same reason grown somewhat unwieldy, and it would seem that the time has come either for severe pruning or for a two-volume work.

The new edition has been well done. The difficult task of dovetailing the Carriage of Goods by Sea Act and the law resulting therefrom into the main structure of the law has been accomplished in a masterly way. There have been important developments in a number of directions and these have for the most part been given due weight, though the importance of some cases, *e.g.*, *Hain Steamship Co.* v. *Tate & Lyle, Ltd.* (1936), 41 Com. Cas. 350, has not quite been appreciated. All the cases and statutes appear to have been noted up to date, though there are one or two serious errors in the table of cases: *e.g.*, *Tempus Shipping Co.* v. *Dreyfus*, [1931] A. C. 726, and *Dreyful* v. *Tempus Shipping Co.* both appear, but with references to quite different sections of the book.

Payne's Carriage of Goods by Sea. Fourth edition. By John Samuel. London: Butterworth & Co. (Publishers), Ltd. xxiv, 157 and 8 pp. 8s. 6d. net.

The editor of this valuable students' text-book has achieved the noteworthy feat of reducing its size by some twenty pages. This has been done by bringing the Carriage of Goods by Sea Act, 1924, into the text at the appropriate places, so that the special chapter on the topic has been omitted. This alteration has necessitated the substantial rewriting of the chapter on the shipowner's liability, which has been well done. A new chapter on "Some Common Exceptions" has been added, though much of the material had been used in other parts of the volume. The most important of the recent cases have been added, and in such

a way as to give them their due weight in the text. Indeed it may be said that the editor has discharged his duties in an able and conscientious manner.

The Carriage of Goods by Sea Act, 1924. By Sanford D. Cole. Fourth edition by the author. London: Pitman & Sons, Ltd. xiv and 138 pp. 7s. 6d. net.

This very useful book has not previously been reviewed in the *Annual Survey*, an omission which the new edition gives us the opportunity to repair. It is intended primarily for commercial readers and is couched in such plain and non-technical language that it must be of great service to them. It would furnish lawyers also with a useful introduction to its subject-matter.

Part I, which consists of a general Introduction, contains a description of the scheme of The Hague Rules, together with an interesting history of the legal and business developments which led to their formulation. This is really essential to the proper comprehension of the statute.

Part II contains the Act itself, together with the Rules which are of course incorporated in it. The sections of the Act and the Rules are set out in heavy type, which will be found a considerable convenience. Each section and each rule has appended to it the author's note, and many of them not only deal with the common law rules and the decisions under the Act itself, but also with the commercial aspects of the matter as reflected in the speeches of commercial men. The discussion of the more important decisions on the statute and rules is very full, and brings out the points in dispute in a way which any business man should be able to follow.

The actual text of The Hague Rules, which does not correspond exactly with the Rules in the Schedule to the Act, are given, both in English and French, in appendices; also the relevant American, Australian and French laws.

Company Law

Palmer's Company Precedents. Part I, General Forms; and Part III, Debentures. Fifteenth edition. By A. F. Topham, K.C., and A. M. R. Topham. London: Stevens & Sons, Ltd. clvi and 1632 pp. (with index); cx and 1032 pp. (with index). £3 15s. and £2 15s. net.

With these two volumes Messrs. Topham bring their

substantial and responsible task of producing the fifteenth edition of *Palmer's Precedents* to a close. Their work reaches the same high standard of scholarship displayed in the earlier volumes, and provides a book of precedents even more essential to the work of the company draftsman to-day than was the original edition to the practitioners of its time. A number of new and valuable precedents have been added together with some new forms. Little alteration in the notes, which are such a valuable feature of this work, has been called for, as the few relevant cases decided since the last edition have been mainly confined to two or three topics. The volumes have, however, grown to a somewhat portentous size, and while it is not easy to judge of the actual requirements of the practitioner we should have thought that by judicious pruning a considerable amount of space could have been saved, particularly in Volume I.

Palmer's Company Law. Sixteenth edition. By A. F. Topham, K.C., and A. M. R. Topham. London: Stevens & Sons, Ltd. clii and 762 pp. (with index). £1 5s. net.

The indefatigable Messrs. Topham have also succeeded in producing a new edition of *Palmer's Company Law.* This, in some ways the most generally useful of the text-books on this subject, especially perhaps to the practitioner who is not a specialist, and also to the advanced student, was reviewed in the *Annual Survey*, 1933, and it is not proposed to add to what was there said.

The principal new feature of the present edition is the complete recasting and reorganisation of the chapters on winding up. The important changes in the law as to voluntary winding up effected by the 1929 Act, with the consequent alterations of practice, called for this. But even apart from that the work was needed as the importance of voluntary winding up, which accounts for nine out of ten liquidations, had rather been overlooked in previous editions, presumably since the work of the barrister practising in this subject is more likely to bring him into contact with the compulsory type. This section is now well up to the general standard of the book. The more important of the numerous decisions have been incorporated, and some space has been gained by reducing the number of cases used as illustrative material, a pity from the point of view of students at any rate.

Principles of Company Law. By A. F. Topham, K.C., and A. M. R. Topham. Tenth edition. London: Butterworth & Co. (Publishers), Ltd. l, 437 and 52 pp. 7s. 6d. net.

It is essential that a students' text-book such as *Topham*, which is used by more professional students than any other, should be kept up to date. This explains the frequent editions. While no changes in the law of a striking character have taken place, the recent Law Reform Acts have necessitated a number of alterations which are not without importance, while a certain proportion of the large number of cases which the reporters deem worthy of a place in the reports are also of interest to students. The editors, as ever, make their selection from these judiciously, but the size of the work is growing relentlessly, and soon we should like to see some judicious pruning. At the same time a table of statutes would be useful, especially if it were to give the sections of the Companies Act, 1929, with references to the pages in the text where they are discussed. Some attention ought also to be paid to the index.

Crew's Company Law. Fourth edition. By the author and W. G. H. Cook. London: Butterworth & Co. (Publishers), Ltd. xxv, 374 and 89 pp. 7s. 6d. net.

Mr. Crew's book is intended for accountancy students and others who are not studying the subject as lawyers. It contains a great deal of information, and although this is not presented in a particularly attractive manner much of it is not readily accessible in other students' text-books; *e.g.*, those chapters dealing with the legal position of statutory companies. A useful feature is the considerable number of quotations from the judgments. The lack of legal scholarship which is only too evident is of less importance to the type of student who uses this book than it would be to professional law students.

The present edition contains no marked changes. Most of the more important recent decisions have been brought into the text, and also the statutes.

Principles of Company Law. By J. Charlesworth. Second edition by the author. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. xlvii and 320 pp. 7s. 6d. net.

It is not many years since this book first appeared. It

became popular with students at once, and we are not surprised that a new edition should be required already. Dr. Charlesworth has considerable powers of exposition, is as a rule lucid, and succeeds without overburdening his reader in providing a substantial amount of detail in comparatively small compass. His illustrations are apt and usually well set out.

The new edition does not contain much new material. The introductory chapter has been partly rewritten, and several chapters have been altered somewhat, such as those dealing with directors, dividends, meetings and receivers. The most important of the recent decisions have been incorporated, though Dr. Charlesworth has been a little sparing in this respect. It is a fault on the right side, however, for the volume should be kept within a reasonable compass.

The Secretarial Handbook. By E. Westby Nunn. Fourth edition by the author. London: The Solicitors' Law Stationery Society, Ltd. viii and 254 pp. 7s. 6d. net.

This book is one of the numerous handbooks intended to guide company secretaries through the intricacies of those sections of company law which most concern them. It is among the best we have seen. Written in a very lucid and straightforward manner by an author with much experience of writing about company law points it deals with its subject in an eminently workmanlike style, keeping the amount of actual legal disquisition down to the minimum required, and giving much practical advice which is only quasi-legal in character. Attention has obviously been paid to arrangement, which should enable the company secretary to find his way about the volume easily. There is a useful "secretarial programme", and naturally a considerable number of forms, taking up more than forty pages; the index, too, is unusually comprehensive. There are a number of minor errors of legal scholarship, but these are of no great moment in a work of its particular type.

Insurance

The Law Relating to Road Users' Rights, Liabilities and Insurance. By Hector Hughes, K.C. London: Sweet & Maxwell, Ltd. liv and 575 pp. 30s. net.

This is an attempt, on the whole successful, to set out

those portions of the general law which govern the civil position of motor vehicles and their owners. The general liabilities of road users at common law and under statute are set out lucidly and competently, except for some inadequacy in the treatment of contributory negligence. The special position of road users is then treated of in a series of informative chapters. The last and most substantial part of the volume consists of a treatise on motor vehicle insurance which is valuable for its discussion of the decisions under the Road Traffic Acts, 1930 and 1934. There is an exceptionally useful set of appendices giving the relevant statutes, precedents, etc. We make no doubt that Mr. Hughes' treatise will be exceedingly useful to the average practitioner.

Eldridge on Marine Policies. Third edition. By Harry Atkins. London: Butterworth & Co. (Publishers), Ltd. xlviii, 291 and 20 pp. 30s. net.

The number of English text-books on Marine Insurance is singularly few considering the importance of the subject. A book about the size of *Eldridge* is very useful, and it is a pity that his work is not more scholarly and well put together. It is a good example of the old-fashioned text-book which was so prevalent in the last century before the scientific epoch of Pollock and Anson. It contains much valuable material but it is badly arranged, and never properly explained or expounded. A student or even a practitioner coming fresh to the subject would find it difficult to keep a clear head.

The new edition, while it brings the law up to date, does little to remedy the defects just noticed.

The Law of Industrial Insurance. By B. C. Hoskins. London: Stone & Cox, Ltd. xxii and 224 pp.

In view of the shortage of text-books on this subject this work will no doubt be found useful, though we could have wished for a more scholarly volume. After an Introduction which will hardly be intelligible to those not already familiar with the subject Mr. Hoskins gives the text of the relevant statutes together with notes thereto. The latter are clear and practical, though they seldom go beyond the bare bones of the matter. A substantial portion of the volume is taken up by a digest of cases. This covers a large number of important cases on the subject of Industrial Insurance and

also of insurance generally : these are dealt with so shortly, however, as to be of very little value, unless as a pointer to the reports. The well-known case of *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516, for example, gets four lines.

There are valuable appendices giving the relevant Statutory Rules and Orders, a number of forms, and the report of the important Cohen Committee.

Sale of Goods and Hire Purchase

The Law of Hire Purchase. By W. G. Earengey. Second edition by the author. London: Stevens & Sons, Ltd. xl and 312 pp. £1 1s. net.

The new Act has called for a second edition of this excellent text-book. Of the several useful works which this branch of the law has called forth Judge Earengey's has been regarded as the most scholarly. Although he states the law in a lucid and comprehensive manner the author's real interest lies in the discussion of the more acute legal problems to which the decisions have given rise. A good example of this is his handling of the *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K. B. 244 group of cases. At the same time his treatment of such matters is eminently practical, for he indicates how such difficulties should be surmounted by draftsmen of hire-purchase agreements, of which precedents are now given. While valuable to solicitors, Judge Earengey's book is therefore likely to make its greatest appeal to barristers engaged in this branch of work.

The method chosen for incorporating the Hire-Purchase Act, 1938, is not altogether satisfactory, as it hardly sufficiently brings out and stresses the fundamental changes in the law effected by that statute in the cases where it applies, which after all will be the vast majority. The Act is set out in an appendix, together with a series of critical and valuable notes in which some of the difficulties of construction to which the Act gives rise are acutely discussed. In the main text references to the changes are made in heavy type, and the changes themselves are incorporated in the text, partly verbally and partly by reference, a procedure which is apt to be confusing.

The Law of Hire-Purchase. By Maurice Share. London: The Solicitors' Law Stationery Society, Ltd. xl and 348 pp. 15s. net.

This is a workmanlike and competent piece of work. The passing of the Hire-Purchase Act, 1938, has naturally called forth various volumes on the subject of hire purchase, and a practitioner requires a book which deals both with the common law of the subject, which still applies in the many cases which are not governed by the Act, and with the special provisions of the statute. This Mr. Share has undertaken to provide. He sets out the law in twenty short chapters, some of which are very general in character, such as those on Capacity, Mistake, Misrepresentation and Illegality, and in each chapter he discusses the general law first, and afterwards sets out the relevant provisions of the 1938 Act.

Hire-purchase gives rise to many problems of great legal difficulty, some of which have still to be made the subject of judicial pronouncement, and others of which are only fitfully illuminated by the judgments, which in the majority of cases are of disappointing quality. Mr. Share, who is concerned with the ordinary practitioner, does not pretend to enter deeply into such matters, but he does indicate their existence (*e.g.*, the implied condition as to title discussed in *Karflex, Ltd.* v. *Poole*, [1938] 2 K. B. 251, and the troublesome judgment of the Court of Appeal in *Felstone Tile Co.* v. *Winget*, [1936] 3 All E. R. 473, to mention no more).

The volume is sufficiently wide in scope, and in particular gives a good description of the method of financing hire-purchase contracts, together with such law as has yet been pronounced. There are in addition three useful appendices giving the text of the 1938 Act, of sections from other relevant statutes, and some useful precedents of hire-purchase agreements.

The Law Relating to Hire Purchase. By Gerald Abrahams. London: Eyre & Spottiswoode. xvi and 110 pp. 12s. 6d. net.

This short work, which is called by its author a digest, does no more than set out the fundamentals of the subject.

This part of the book, which occupies less than forty pages, is accurate and clearly expressed. The new law enacted by the Hire-Purchase Act, 1938, is dealt with in paragraphs set

slightly back from the main text and marked with a heavy line in the margin, a method which should prove of great convenience to practitioners.

The second part of the book is taken up with a digest of the more important decisions, occupying rather less than twenty pages. These digests are rather over-compressed to be of much value other than as illustrations. The remainder of the volume is taken up with the text of the Act, to which is appended a series of notes which on the whole are likely to prove useful. Mr. Abrahams is a young man who rejoices in the exercise of his critical faculties at the expense of Parliamentary draftsmanship, a game which most of us have played from time to time. His criticisms, many of which are certainly acute, seem to be inspired by a prejudice, common in the profession, against any statute which is aimed at reducing or even regulating the full rights which the common law conferred upon property owners. This is hardly a satisfactory approach for the successful handling of modern social legislation.

The book is admirably printed and produced. This, no doubt, explains its rather high price.

The Hire-Purchase Act, 1938. By A. C. Crane. London: The Trader Publishing Co., Ltd. x and 129 pp. 8s. 6d. net.

This is an annotated edition of the Act with a very useful set of forms in an appendix. These forms have been specially settled for use under the statute. The appendix also gives the Scottish Act of 1932 which was used by the draftsman of the English statute. The notes which are by a solicitor are comprehensive, and show a grasp of what is likely to be required by his fellow practitioners.

A Guide to the Hire-Purchase Act, 1938. By H. A. Curtis. London: Methuen & Co., Ltd. xi and 49 pp. 2s. 6d. net.

This is a much slighter work by a member of the Institute of Secretaries. It is intended for the lay reader and, on the whole, gives quite an understandable account of the statute. The author would have been well advised to have his manuscript looked over by a lawyer as he makes a few serious errors, and his use of technical terms such as bailment without explanation is likely to puzzle his public.

Periodical Literature

Modern Perils to the Collecting Banker. By Dr. A. G. Davis. 2 Modern Law Review 222. *Lloyds Bank* v. *Savory* and other recent decisions are criticised as throwing an additional, and, from the business man's point of view, unreasonable burden on the collecting banker.

Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law. By Israel Treiman. 52 Harvard Law Review 189. The article contains a discussion which is interesting both for its historical remarks and its suggestions for possible reforms.

The Basis of the Power of an Agent in Cases of Actual and Apparent Authority. By Professor J. L. Montrose. 16 Canadian Bar Review 757.

Irrevocable Letters of Credit in Modern Commerce: Some Practical Considerations. By Professor Philip W. Thayer. 16 Canadian Law Review 79.

The Bills of Exchange Act and Novation in the Province of Quebec. By George V. V. Nicholls. 16 Canadian Bar Review 602, 706.

Third Party Insurance. By Professor R. S. T. Chorley and A. M. Finlay. 2 Modern Law Review 86.

The following articles and reports of lectures from technical journals are of more than topical interest :—

Share Registers and Nominees. 185 Law Times 429.

Fluctuating Currencies: "The Pound" and Contracts. 185 L. T. 449.

Objects and Scope of the Hire-Purchase Act, 1938. 86 Law Journal 219.

Recent Developments in Agricultural Law. 86 Law Journal 169, 183, 196.

Confirmed Credits. By A. M. Finlay. 85 Law Journal 4.

Comparative Advertising. 82 Solicitors' Journal 586. Contains references to German law and attitude of British Chambers of Commerce.

The following articles on Company Law and Practice in the *Solicitors' Journal* are of special interest (references are to vol. 82) :—

Goodwill (p. 7)—methods of valuing; *Jurisdiction to Wind Up Foreign Companies* (p. 85); *"Just and Equitable" Winding-up Order* (p. 205); *Meetings of Debenture Holders* (p. 344); *Voting Powers: the position of a nominee with conflicting interests* (p. 285); *Scope and Effect of Arbitration Clauses in Articles* (p. 788); *Powers of a Secretary* (p. 846).

INDUSTRIAL LAW

LEGISLATION

1 & 2 Geo. 6, c. 70.

Substantial progress was made in the development of industrial law during the year under review. The *Holidays with Pay Act* marks an important stage in the movement for "recognition" which has featured so largely in the demands of trade unions in most, if not all, industrial countries. Legislation providing for holidays with pay has been passed nearly everywhere, though the groups of workmen affected naturally vary from State to State. A new line of approach was taken by Germany. This nation, while in other respects withholding recognition, granted her workmen perhaps the most far-reaching holiday facilities; but it was not by legislation that this goal was achieved; it more or less sprang up as a consequence of National Socialist party discipline coupled with industrial regimentation. The English Act has adopted a method which is designed to fit this almost revolutionary right with the minimum of friction into the general scheme of labour law. Existing bodies are called upon to fix as arbitrators the length of holidays and the pay to be granted to the workmen. New "wage regulating authorities", that is to say, trade boards, by now regulating some forty-five trades, the Agricultural Wages Committee, and the Road Haulage Central Wages Board are given power to "direct that any workers for whom a minimum rate of wages or statutory remuneration is being or has been fixed by them shall be entitled to be allowed holidays" of not more than one week in twelve months; in agriculture no continuous period of more than three days shall be granted. This by itself would leave in the cold workers of trades without a wage regulating authority. It has therefore been further provided that the Minister of Labour may approve schemes on the joint application of employers and workers. He is also given power to assist schemes by attaching officers of the department to undertakings as well as by money grants. By such grants the expense necessarily involved in the general scheme can in suitable cases be borne, at least partially, by the community as a whole; a wise provision, for some undertakers might otherwise be crippled by the new obligation and

it would have been unfair to throw the whole burden of a social reform, made in the general interest, on a necessarily small group of citizens. If an employer fails to grant holidays as directed he becomes liable to a fine not exceeding £20. A cause for some dissatisfaction may be the provision that separate minimum rates for holiday pay may be fixed; it seems as if the Act does not envisage the payment at the full rate during the period when no work is done.

Next in importance come five statutes dealing with labour conditions in special industries. Perhaps the most important is the *Road Haulage Wages Act*. Since road haulage is one of those industries where, more than in any others, the fate of workers is linked up with that of other members of the public, the Act contains both labour and general safety provisions. In Part I the Minister is given power to appoint a Central Board and a number of Area Boards; these shall control road haulage contractors operating under A and B licences, but the Act does not apply to railway companies or to cases where a minimum wage agreement is in existence. The Boards shall make proposals to the Minister for fixing minimum wages, and shall make recommendations to Government Departments generally in respect of safety on the roads as well as health and comfort of workers generally. This is an interesting provision, since it tends to break through traditional bureaucratic channels; for the board, though appointed by the Minister of Labour, will, in the course of its work, of necessity have to report also to the Ministry of Transport, and perhaps also to the Board of Trade. 1 & 2 Geo. 6, c. 44.

In Part II special provision is made for private carriers operating under a C licence. Except where a minimum wage is fixed by another enactment, any worker or union may apply to the Minister if wages paid in particular cases are considered unfair, and the Minister shall then refer the matter to the Industrial Court for the fixing of minimum wages and holiday pay. Such right to apply if given to individuals might easily be abused; to prevent this, section 4 (3) provides that no wages shall be considered unfair if they correspond to an order made under Part I of the Act, if a collective agreement is in existence, if the remuneration corresponds to the wages paid under a collective agreement in force in another district, if it is equivalent to any decision by any independent board for similar workers, or finally if some other employer in the

district of the workmen pays equivalent wages, and such wages have been fixed by the Industrial Court upon a reference under this Act. This amounts to a least favoured workers clause, since a *prima facie* case for wages being unfair can be made out only by showing that they are lower than any comparable award made in the United Kingdom. Employers under both parts of the Act are in case of default liable to a fine not exceeding £20, but an employer may exonerate himself by proving that the default was committed by an agent, and that he himself used due diligence.

1 & 2 Geo. 6, c. 69.

Next in importance comes the *Young Persons (Employment) Act*. This deals with a number of trades where young persons had hitherto been withheld protection, namely the collection and delivery of goods, messengers, residential hotels, clubs, and entertainments, lift boys, and others. The provisions of the Act are similar to those regulating the employment of young persons in other trades and industries. If the employee is under sixteen years of age the working week shall in principle not be longer than forty-four, if between sixteen and eighteen years not longer than forty-eight hours; subject to certain safeguards overtime is allowed in times of seasonal or unusual pressure, and in emergencies. Provision is further made for half-holidays, work on Sunday, intervals for meals, etc. Moreover, in order to facilitate control employers must keep records of the work done by young persons; this control is exercised by Local Authorities whose inspectors are given the same powers as factory inspectors under sections 128 and 125 of the Factories Act, 1937. The Shops Act, 1934, is amended by fixing the working week for persons under sixteen years at forty-four hours. Thus the protection of young persons has been carried an important step farther: the length to which the Legislature has gone might perhaps be more appreciated if the provisions were contained in one comprehensive statute, and not spread over a number of Acts dealing with individual trades and industries according to the historical development of this branch of the law.

1 & 2 Geo. 6, c. 41.

The *Baking Industry (Hours of Work) Act* restricts the activities of an old acquaintance, by repealing the Sunday Observance Act, 1677, in its application to bakeries. In this industry no work shall in principle be done between 11 p.m. and 5 a.m., but one of the following exceptions, which are mutually exclusive, may be made. Night work may be

permitted up to five times a week; permission may be given generally for night work from Fridays to Saturdays or for work beginning at 4 a.m. instead of 5 a.m.; finally an exception may be made to the general rule provided night workers have not done night work for more than two and a half weeks during the five weeks preceding the week for which the exception is sought. The coming into operation of this Act depends to some extent on a trade board being established under the Trade Boards Acts, 1909 to 1918 (s. 15).

The following two Acts are mostly concerned with the organisation of the respective industries, and deal with labour conditions only incidentally. By the *Cinematograph Film Act* persons employed by manufacturers of news, advertisements, and certain educational films shall obtain a regulation of their working conditions in the following manner. If employers and unions do not agree the employers shall be given no less favourable terms than those based on a Resolution of the House of Commons in respect of contracts with Government departments. Any dispute shall be referred by the Board of Trade to the Industrial Court for settlement, whereby regard shall be had to decisions and agreements in similar employments. Any award becomes an implied term in the contract of employment. 1 & 2 Geo. 6, c. 17.

An amendment of sections 388 *et seq.* of the Merchant Shipping Act, 1894, is contained in Part IV of the *Sea Fishing Industry Act.* Owner and skipper of trawlers having a tonnage of twenty-five tons or upwards must in future deliver an account not only to the members of the crew, but also to the superintendent of Merchant Marine. The superintendent has power to inquire into the correctness of the account, and to satisfy himself that no deductions have been made which do not appear in it. The Act also contains some minor amendments dealing with agreements of skipper and members of the crew with the owner. 1 & 2 Geo. 6, c. 30.

Mention may also be made of a new Board set up by the *Herring Industry Act* to keep under review the conditions of persons employed in this industry. 1 & 2 Geo. 6, c. 42.

It has been found necessary to remove certain grievances existing with regard to the comprehensive social insurance legislation of the previous years.

Thus, the *National Health Insurance (Juvenile Contributors and Young Persons) Act,* 1937, brings employed boys and 1 & 2 Geo. 6, c. 3.

girls between school-leaving age and sixteen into the scheme of insurance; and by the *National Health Insurance (Amendment) Act* hardship is removed which was unintentionally inflicted by the Consolidation Act, 1936, on persons who for two years before employment commenced were owners of the business or related to such owners. The grievance of such persons in "family employment" was discovered by a Court case (Hansard, vol. 331, p. 2191), and the new Act enables the Minister to review cases decided by him under the old Act.

1 & 2 Geo. 6, c. 14.

The Superannuation legislation of previous years has also necessitated certain amendments of existing statutes. In order to safeguard seamen against excessive deductions from their wages, or assignments of them before they fall due, section 163 of the Merchant Shipping Act, 1894, provided for wages to be paid in full subject only to certain clearly defined exceptions. This made deductions or assignments for the purpose of superannuation impossible. The *Merchant Shipping (Superannuation Contributions) Act*, 1937, now establishes a new exception. In future, deductions and assignments are valid, provided the amounts not actually paid to the seaman are transferred to the Merchant Navy Officers Fund or any other approved superannuation fund.

1 & 2 Geo. 6, c. 4.

By the *Superannuation (Various Services) Act* legal personal representatives, widows, and dependants of civil servants, retired after the commencement of this Act, shall be entitled to certain allowances and other superannuation benefits. Sums not exceeding £100 in respect of salary, wages, or superannuation benefits may in certain cases be distributed without probate.

1 & 2 Geo. 6, c. 13.

In this connection the *Blind Persons Act* deserves notice; it provides that old age pensions shall be paid to blind persons who have attained the age of forty years, as against fifty years fixed under the Old Age Pensions Act, 1936. Moreover, the Blind Persons Act, 1920, has been amended by extending the powers of Local Authorities to promote the welfare of blind persons, and to consider, when granting assistance, the circumstances of the blind person's family.

1 & 2 Geo. 6, c. 11.

The *Unemployment Insurance Act* contains three minor amendments of the 1935 statute. Where education authorities arrange instructional courses for unemployed persons they shall be entitled to supply meals to them. Moreover, certain persons in domestic service have been included in the scheme. Finally, section 30 of the principal Act receives a

1 & 2 Geo. 6, c. 8.

new sub-section 3 and section 96 (6) is repealed. Seamen, marines, soldiers, or airmen dismissed in consequence of a conviction by a disciplinary Court shall no longer be altogether disqualified from receiving unemployment benefit, but only for a period of six weeks; the rigour of the old law in future applies only to deserters. The scheme has been extended so as to embrace members of the service discharged at their own request.

The next enactment to be mentioned is the *Workmen's Compensation (Amendment) Act* which amends section 3 (1) and (2) of the principal Act. By the old law persons plying for hire with vehicles or vessels which they had hired from the owners were regarded by the Act as workmen. The amendment strikes out the word "owner", so that "workmen" now includes also sub-hirers of such conveyances. 1 & 2 Geo. 6, c. 27.

Finally the *Expiring Laws Continuance Act*, 1937, extends the operation of the Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2) and the Cotton Manufacturing (Temporary Provisions) Act, 1934 (24 & 25 Geo. 5, c. 30). 1 & 2 Geo. 6, c. 1.

Subordinate Legislation

There have been no Orders or Regulations of special interest. The Factories Act, 1937, necessitated new Rules, and thirty-one Orders were made dealing with these matters. Likewise, two Orders are designed to bring Regulations into line with the Employment of Young Persons Act, 1938.

Social insurance was responsible for the bulk of the Orders. Over thirty were made under the National Health Insurance Act. Of these No. 257, the *National Health Insurance (Approved Societies) Regulations*, commands perhaps the greatest interest, since it shows to what extent public authorities influence the management of societies.

Unemployment ranks second with some fifteen Orders, the most important of which is No. 656, amending the special scheme in force for the banking industry. Lastly there are some eleven Orders dealing with the Contributory Pensions Acts. The following deserve special notice:—

Nos. 461 and 816, regulating the collection of contributions of persons over sixty-five; No. 481, dealing with claims and payments under the Acts; Nos. 596 and 1108, on voluntary contributors.

Seven Orders were made relating to Trade Boards. New

Regulations deal with the constitution and proceedings of the following Boards:—

No. 1344, boot and floor polish trade;

No. 810, perambulator and invalid carriage trade;

No. 1497, button manufacturing trade.

CASE LAW

Though there have been no decisions of outstanding importance during the year under review, a number of points, notably under the Workmen's Compensation Acts, were illustrated. The doctrine of common employment continues to supply lawyers with material and workmen with unremedied grievances.

Master and Servant

Servant's duty of secrecy.

This year has again brought a decision on the skilled servant's duty of secrecy. In *British Industrial Plastics, Ltd.* v. *Ferguson*, [1938] 4 All E. R. 504, one Doherty had for many years been employed by the plaintiffs, who were manufacturers of plastic materials. When Doherty left the plaintiffs' employment in 1932, a so-called leaving agreement was made whereby Doherty stipulated not to interest himself directly or indirectly for a period of two years in the manufacture or sale of certain chemicals which in substance included the constituents of the plaintiff company's process. When the two years were over Doherty disclosed the process to the defendant. The principal question was whether the defendant had induced Doherty to commit a breach of contract; with regard to this question see the Section on "Tort". With regard to the preliminary question, whether Doherty had in fact committed a breach of contract, the Court of Appeal held that he had, since the disclosure of the secret process was contrary to an implied term not to do so in the service agreement; the leaving agreement of 1932 did not absolve Doherty from this duty to his former employers.

Lending a servant.

A nice point arose in *Willard* v. *Whiteley, Ltd.*, [1938] 3 All E. R. 779. There the plaintiff had let a lorry to the defendants, and had also supplied the latter with his driver. The driver was under the defendants' control with regard to the work, but they were not entitled to dismiss him, and the

plaintiff continued to pay his wages. Through the driver's fault the lorry met with an accident and was damaged, and the plaintiff sued. But the Court of Appeal decided on the facts that the driver was still the plaintiff's servant, and that therefore the defendants were not responsible.

Common employment.

The doctrine of common employment seems of late to be regaining some of its lost ground. Last year we reviewed the decision of the Court of Appeal in *Radcliffe* v. *Ribble Motor Services, Ltd.*, 54 T. L. R. 260. That decision has just been reversed by the House of Lords, and will be reviewed in next year's volume. However, in the meantime, Macnaghten, J., had to decide another case turning on that doctrine. In *Metcalfe* v. *London Passenger Transport Board*, 54 T. L. R. 678, the plaintiff was a conductor of a bus belonging to the defendants. While the bus was stationary to await the traffic lights turning green a tramcar, also belonging to the defendants, crashed into the bus, seriously injuring the plaintiff. Negligence of the tram driver was admitted, and the defendants relied solely on the defence of common employment. The plaintiff tried to combat this plea by reference to *The Petrel*, [1892] P. 320, where in a case of a collision between two ships belonging to the same owner the crew of the two ships were, generally speaking, not held to be in common employment. With great deference it is to be regretted that the learned Judge did not take this view. He somewhat summarily held that ships and road vehicles were not on the same footing. Moreover, he felt himself bound by the decision of the Court of Appeal in *Radcliffe* v. *Ribble Motor Services, Ltd., supra.* It is not suggested that *Metcalfe's Case* was wrongly decided, but it would seem that an opportunity was missed of limiting this unsatisfactory doctrine. As almost everybody is agreed that the doctrine should be abolished, and since the House of Lords have just restated the doctrine in the *Radcliffe Case* in a way which would seem to allow the plea in the *Metcalfe Case*, it seems that there is now nothing but an Act of Parliament that can bring about this result.

Right of seamen to refuse work.

Next, two shipping cases attract attention. The first, *Robson* v. *Sykes*, 54 T. L. R. 727, is connected with the Spanish Civil War. Seamen lawfully engaged under articles refused to proceed to Seville, which was an insurgent naval base, with a cargo of nitrate. They justified their refusal by pointing out that the proposed voyage was not an ordinary

commercial adventure. The fact that they were ordered to enter a war zone with its increased dangers to shipping entailed grave risk of destruction or capture of the ship, and death or captivity to the crew. The owners preferred an information against the seamen under section 225 (1) (*e*) of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), but the rule was discharged. It was a question of fact whether a particular voyage was an ordinary commercial voyage, and in the present case there was ample evidence to justify the men's refusal. Branson, J., laid down at p. 730: "The resolutions passed by the crew showed that they were animated in their determination by some political preference. Had that been the only ground it would have been quite irrelevant, and would have afforded no justification for the crew's refusal, but the grounds set out in a subsequent paragraph (and summarised above) afforded ample justification."

Loss of work by reason of wreck.

The other case dealt with the construction of section 1 of the Merchant Shipping (International Labour Conventions) Act, 1925, which entitles a seaman to two months' wages from the date of the wreck of his ship if he fails to find other work during that period. The case turned on the question: at what moment did the ship become a wreck? What happened in *The Terneuzen*, [1938] P. 109, was this: On January 27 the ship was driven ashore and remained fast. Since salvage efforts were unsuccessful most of the crew were discharged on February 24. On April 14 the salvors finally abandoned their efforts, and on May 5, more than three months after the casualty, the owners abandoned the vessel to the underwriters and paid off the remainder of the crew, including the plaintiff, who had been the chief officer. He failed to find other employment and sued under the Act; but the defendants contended that the ship was wrecked on January 27, that the original contract had then terminated, but that they had employed the plaintiff beyond the statutory two months' period, and that he had no further claim. However, Henn Collins, J., held, applying the principle in *The Olympic*, [1913] P. 92, that a ship is wrecked only if the injury is such as to make the continuance of the voyage useless as a commercial venture. In this case the venture was not in fact abandoned until May 5, and the plaintiff was entitled to two months' wages from that date. The decision is certainly in the interest of the plaintiff, who belongs to the class of people

whom the Act desired to protect, but it produces an uncertainty. Did those members of the crew who were discharged on February 24 lose their employment by reason of the wreck? If this question is answered in the affirmative, there would be several dates on which the ship is to be regarded as a wreck; if it is answered in the negative the seamen paid off after the casualty, but before abandonment, would not be discharged by reason of the wreck and would not enjoy the benefit of the statute; it would allow owners to avoid liability by dismissing the men before finally abandoning the voyage.

Nokes v. *Doncaster Amalgamated Collieries*, [1939] 1 K. B. 70, is discussed in the Section on Company Law.

Truck Acts

Deductions.

An interesting, but in the result unsatisfactory, case under these Acts was *Pratt* v. *Cook, Son & Co., Ltd.*, [1938] 2 K. B. 51; 55 T. L. R. 86; unsatisfactory especially because Wrottesley, J., at the trial, and Goddard, L.J., in the Court of Appeal, were for allowing the claim, but the majority in the Court of Appeal, Slesser and Finlay, L.JJ., for dismissing it. The facts were simple enough. The plaintiff had for sixteen years been employed as a packer in the wholesale drapers' business of the defendants. When he entered their service it was orally agreed that instead of a weekly cash payment of 10s. dinner and tea should be provided on the defendants' premises. The plaintiff never asked for cash payment of 10s. instead of the meals, but, when he was dismissed in 1936, sued the defendants under the Truck Act, 1831, s. 8, as amended by the Truck (Amendment) Act, 1887, s. 2, for payment of 10s. per week over the entire period of his employment. At the trial the plaintiff was successful. Beyond doubt he was a workman doing manual labour. The principal difficulty was presented by the Truck Act, 1831, s. 23, under which certain deductions, *inter alia* for food cooked and consumed on the employer's premises, are permitted provided the workman has consented thereto in writing. In fact no such written consent had ever been given, and the deductions were declared unlawful. Since the debt was founded on statute it was in the nature of a specialty debt, and could therefore be claimed within twenty years. On appeal this decision was reversed by a majority. Slesser and Finlay, L.JJ., held, in this respect basing their judgments

on findings of fact at the trial, that what had happened in the present case was not a deduction from the weekly wage, but a remuneration consisting partly of money and partly of goods. Section 23 therefore did not apply, the lack of a written consent was harmless, and the defendants' appeal succeeded. Goddard, L.J., on the other hand, agreed with the trial Judge. In a forceful judgment he pointed out that the statute must be construed by bearing in mind the mischief which it was desired to avoid. "Put concisely, the combined effect of sections 1, 3 and 23 is, in my opinion, that the employer of a manual labourer must agree to pay, and must pay, wages in money and not in kind. The employer may supply goods or services to workmen as to any other member of the community, but he can only deduct the price from the workman's wages for such of the goods or services as are specified in section 23 and if the workman has agreed in writing to the deduction being made." It is respectfully submitted that this judgment is more in accordance with the spirit of the Act. The distinction made by the two learned Lord Justices who were in the majority appears to open the door to practices well within the mischief of the pre-statute days. Besides, as was also pointed out by Goddard, L.J., it fails to give sufficient weight to section 3, which provides in the most absolute terms that wages must be paid in the current coin of the realm. While we thus, with great deference, believe that the case was wrongly decided, the question suggests itself whether the Truck Acts are still of any special importance considering that the workman is now backed by powerful trade unions which are fully capable of protecting his interests. Indeed, in the present case the collective agreement between employers and workmen in the industry provided for the deduction from the wages of a certain sum for meals. It was only because technically the plaintiff was not a party to this agreement that the difference of opinion arose between the learned Judges. Regarded from this para-legal point of view the final decision would seem to be satisfactory in the circumstances.

Factory and Workshop Act and Shop Acts

A number of decisions have been made during the year under these statutes, but only the following merit special consideration. "A large part of the purpose of these statutes

was to save workmen from themselves. That is to say, not to save them from deliberate acts of mischief, but to save them from consequences which they may incur, if, in haste, hurry, carelessness, or indolence, they do something in a way in which they ought not to do it." These words were spoken by Lord Hewart, C.J., in *Sutherland* v. *James Mills, Ltd.*, 36 L. G. R. 167, where it was held that employers were guilty under the Factory and Workshop Act, 1901, s. 10 (1), for not fencing the gear wheels of a power machine. The workman's hand was caught in the wheels which he had approached negligently and in disregard of warnings. But the duty of the employer is absolute and the workmen's negligence is no excuse. On the other hand, where fencing was temporarily removed to facilitate experiments with a new type and to examine lubrication, the occupier of the factory was held not liable to pay the penalty: *Atkinson* v. *Baldwins, Ltd.*, 158 L. T. 279.

Dangerous machinery.

The relation between the Factory and Workshop Act, 1901, s. 10, and Regulations made under section 79 was discussed in *Lewis* v. *Denye*, [1938] 2 All E. R. 818. A sixteen-year-old boy was working on a woodworking machine, which was fenced in accordance with the Regulations made under section 79, but the fencing did not conform with the wide terms of section 10. Tucker, J., held that it was not possible to interpret section 10 in the light of the Regulations, but that the section imposed on the occupier of the factory an independent obligation. However, the plaintiff's claim was nevertheless dismissed. Under the regulations the plaintiff was bound to use a push-stick to remove the off-cut. In contravention of the Regulations and of oral instructions to the same effect he used his hand, and thereby lost his fingers. In the learned Judge's opinion this was the real cause of the accident. Though, generally speaking, it is still an open point whether contributory negligence is a good defence in an action for the breach of a statutory duty, in the present case the plaintiff was guilty of more than mere contributory negligence, he had himself broken a statutory duty, since the Regulations imposed the duty of using the push-stick on the workman. The learned Judge regretted that he could not take into consideration the fact that though the Regulations were posted in the factory the plaintiff had neither read them nor had he had any knowledge of their existence.

Contributory negligence.

Servant's breach of statutory duty.

The vexed question, what is a factory, and who is its

The factory in the factory.

occupier, came up for decision in *Smith* v. *Cammell Laird & Co., Ltd.*, [1938] 2 K. B. 700. The defendants were building a ship for the Blue Star Line, and had erected a wooden staging in the lower forehold of the vessel. This staging was no longer used by the defendants, but they maintained it, and, when the Cork Insulating Co., was engaged by the Blue Star Line to do certain work, the defendants permitted its use by the Cork Co. The permission was given not under a contract but as a matter of convenience. At the request of the Cork Co. the defendants made certain alterations, which caused the staging to become unsafe within the Shipbuilding Regulations, 1931, made under section 79 of the Factory and Workshop Act, 1901. Accordingly, when the plaintiff, an employee of the Cork Co., used it, a plank gave way; he fell and sustained serious injuries. Goddard, J., as he then was, and the Court of Appeal, by a majority, dismissed the action. On the facts the defendants were no longer occupiers of the staging. The Cork Co. had become the occupier, and under section 104 of the Act it was possible to regard the staging as a separate factory (Greer, Clauson, L.JJ.). This was the point on which Slesser, L.J., dissented; he thought that the conditions under which such separate occupation could arise did not exist in the present case. The case, which follows the trend of earlier decisions, is of great importance to the shipbuilding industry, where usually a great number of contractors are employed and must needs use facilities provided by others.

Is a warehouse a shop?

Among the cases decided under the Shops Acts *Eldorado Ice Cream Co., Ltd.* v. *Clark; Same* v. *Keeting*, [1938] 1 K. B. 715; 54 T. L. R. 356, deserves at least a passing notice. The case dealt with the construction of sections 11—13 of the Shops (Sunday Trading Restriction) Act, 1936. Had it succeeded, the sale of ice cream on Sundays would probably have become impossible. The respondents in both cases were inspectors appointed by local authorities. In *Clark's Case* the Court had no difficulty in deciding that a warehouse from which ice cream sellers were supplied was not a place where retail trade was carried on; that was done by the barrow or tricycle in the street. Accordingly, in *Keeting's Case* the respondent contended that a box-tricycle was a place where such business was carried on. But it was held that "place" in section 18 refers to a fixed place, to premises. The construction was supported by the words of section 12, which

A chattel a place of business?

required that the address of the shop or place should be stated. "What", asked Lord Hewart, C.J., "would be the address of the box-tricycle?"

Workmen's Compensation

Administration or litigation?

"The tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases round a legislative measure which was intended to be administered, rather than litigated upon." Let it be hoped that these words of Lord Wright's, in *Harris* v. *Associated Portland Cement Manufacturers, Ltd.*, 55 T. L. R. 802, will be acted upon in years to come.

This year again has witnessed an enormous output of decisions on various sections of the Act, of which only a limited number can be recorded in this *Survey*.

Meaning of "workman".

In recent years the Courts have decided on more than one occasion that those running a hospital are not responsible for the torts of nurses and house surgeons, since those persons are not under the control of the hospital authorities, but act under their own professional responsibility. In *Wardell* v. *Kent County Council*, 54 T. L. R. 1026, the defendants contended that those decisions were applicable to workmen's compensation cases. However, the Court of Appeal, Greer, L.J., dissenting, decided against that contention. Tort cases and cases of workmen's compensation stood on an entirely different footing. It was held that a qualified nurse was a workman within the meaning of the Acts, and that she was entitled to compensation if she was injured by the explosion of a kettle in which she prepared a poultice for a patient. It is gratifying to see that the very technical distinction between contracts of service and contracts for services has not been extended to the Workmen's Compensation Acts.

Service and services.

"Out of and in the course of employment"

A number of interesting cases were decided on these words. The first three are borderline cases. In *Knight* v. *Howard Wall, Ltd.*, 55 T. L. R. 227, a canteen was provided on the employers' premises; it was run by an independent contractor, and the workmen usually went there for meals though they were not bound to do so. Certain games were played, among them darts, and on the occasion which gave

Cooper, [1929] A. C. 570. It was never a question whethe the workman was "obliged" to encounter certain perils, bu "were the perils those which the workman in fact encountere while doing the work which he was employed or authorise to do".

Epileptic fits.

The last two cases to be mentioned in this section ar applications of familiar propositions. In *Ironmonger* v. *Vinter*, 31 B. W. C. C. 90, a workman was to the knowledge of his employer liable to epileptic fits. He was employed to clean a dyke and found drowned. The Court held that the obvious conclusion was that the accident was due to an epileptic fit; *Martin* v. *Finch*, 30 B. W. C. C. 99 (*Annual Survey*, 1937, p. 260), was followed.

Mosquito bites.

Finally, where a seaman was employed on a ship sailing to West Africa and was bitten by a mosquito while the vessel called at a mosquito-infested port, his resultant death was held to have arisen out of his employment: *Craig* v. *Dover Navigation Co.*, 55 T. L. R. 169.

Date of Disablement

An important decision on section 48 was *Eaton* v. *George Wimpey & Co., Ltd.*, [1938] 1 K. B. 858. Prior to 1933 the plaintiff had been employed in a certain undertaking, and had contracted dermatitis; he received compensation from 1933 to 1935, and then entered the defendants' business, but in the following year was again certified as disabled because of dermatitis, as from July 15. After having paid compensation for some time the employers found out the plaintiff's earlier illness and stopped payment. They contended that they were not liable, since the plaintiff had been paid compensation from 1933–35, had never fully recovered, and that the illness had not been caused by his work in their factory. However, the Court of Appeal took a different view. MacKinnon, L.J., who delivered the judgment of the Court, stressed the point that the words of the statute are "'due to the nature of' the employment and that they are not 'caused by the employment' or 'contracted during the employment'". The defendants were liable; for the recurrence of dermatitis was due to the nature of the plaintiff's employment with them, and the latter had employed the former within the last twelve months before the date when his disablement was certified, which must be regarded as a

notional accident. According to *Wilsons and Clyde Coal Co.* v. *Flynn*, [1930] A. C. 516, the certificate of the certifying surgeon was conclusive; it was not open to the arbitrator to go behind it and to determine that the disablement in fact commenced at an earlier date. The case was applied in *Maddox* v. *W. A. Gale, Ltd.*, 31 B. W. C. C. 253.

The disablement may also be material between the employer and his insurance company. This was the case in *Mayer & Sherratt* v. *Co-operative Insurance Society, Ltd.*, 55 T. L. R. 326. The policy which the plaintiffs had taken out with the defendants expired on July 11, 1936; the deceased workman had entered the plaintiffs' service in 1929, when he was already suffering from lead poisoning. The disease became worse. On April 11, 1936, the workman ceased to be employed on lead work, in November he was totally disabled, and in March 1937 he died. It was only at the *post mortem* that lead poisoning was discovered as the cause of death. In these circumstances the workman could not have obtained a certificate of disablement under the Act. It was also clear that the plaintiffs were bound to pay compensation to the deceased's dependants. In the present action the plaintiffs sued for recoupment under their policy. Macnaghten, J., allowed the plaintiffs' claim. He was of opinion that the so-called modification (*a*) under which the disablement or suspension shall be treated as the happening of the accident, and on which the defendants relied, had no application to a case where the workman had died without having obtained a certificate of disablement. Though the learned Judge did not say so expressly, this seems to relate the "accident" back to an earlier date, at the latest to April 11, when he ceased to do lead work, and when the policy was still on foot.

Amount of Compensation

Average weekly earnings.

It is not always easy to discover the average weekly earnings on which the amount of compensation is calculated, and certain phenomena attendant on the trade recession have brought up new problems in this respect, two of which came up for judicial review this year. In *Summers* v. *Rhondda U. D. C.*, 159 L. T. 373, an unemployed man had been engaged for nine weeks; it was quite certain that he would not be employed again for some time. In the eighth week he met

with a fatal accident. It was held that the intention of the council not to employ the deceased for some time at the expiration of the nine weeks was irrelevant. This was not casual labour. Accordingly, the weekly earnings must be computed under section 8 (2) and not under section 10 (1), proviso, which was applicable to cases of casual employment.

It was established many years ago that idleness during sickness or extraordinary stoppages owing to breakdown of machinery were not "normal and recognised incidents" of employment, that they did not affect the "rate" of payment, and must be disregarded when computing average weekly earnings under the Act.

In *Morgan* v. *Tareni Colliery Co., Ltd.*, [1938] 1 K. B. 433, the plaintiff relied on that rule in the following circumstances. It was a rule in the defendant colliery that senior workmen should have precedence over junior men, but during a recession the senior workmen consented to an inroad into their rights, and a spread-over system was instituted. The plaintiff, a senior workman, contracted silicosis and contended that his idleness produced by the spread-over system should not be taken into account when computing the average weekly earnings. He contended that his case fell under the above-mentioned rule. The contention, however, found no favour with the Court of Appeal; it was held that the special working arrangement in the colliery had become a "normal and recognised incident" of the employment, and that his actual earnings under the spread-over scheme could alone be made the basis for arriving at the sum due to him as compensation under the Act.

Section 9 (4) of the Act provides that a partially incapacitated workman may receive compensation as if he were totally incapacitated, provided, *inter alia*, he has taken all reasonable steps to obtain employment. The House of Lords in *McLaughlin* v. *Caledonia Stevedoring Co.*, 54 T. L. R. 910, has now circumscribed the workman's burden of proof, and at the same time authoritatively construed the 1931 Amendment of the sub-section. An isolated attempt to obtain employment does not satisfy the provision; "the attempt must be genuine and reasonable in volume". On the other hand, the workman need not do *all* he can; his claim is not defeated if the evidence shows that not all possibilities are exhausted. The decision in this respect

overrules *Hancox* v. *Balfour, Beattie & Co.*, 25 B. W. C. C. 596, and *Donachie* v. *Whitehaven Colliery Co.*, 26 B. W. C. C. 63.

Election

The liberal construction which the House of Lords commonly places on the sections of the Workmen's Compensation Act has resulted in the reversal by that tribunal of the decision of the Court of Appeal in *Avery* v. *L. N. E. Ry.* which was reviewed in *Annual Survey*, 1937, p. 263; [1938] A. C. 606. The widow of a deceased workman had elected to sue under Lord Campbell's Act and the Employers' Liability Act, 1880, but the children proceeded under the Workmen's Compensation Act. The arbitrator had treated the children as sole dependants, but the Court of Appeal held that the children could not be awarded larger sums in the arbitration than they would have received if all dependants had claimed compensation. The House of Lords restored the arbitrator's award. In the words of Lord Atkin, "If the dependants named as respondents (*viz.*, in the arbitration proceedings) neglect or refuse to join in the application, the Judge's duty is to ignore them and to distribute amongst those who do make the application the lump sum compensation available in accordance with the provisions of the Act". It would appear that, while this procedure is very beneficial to the dependants it may fall heavily on the employers. Moreover, several dependants by skilfully arranging which course each of them should adopt may increase the total of damages and compensation to a not altogether justifiable point. However, this consideration is perhaps not decisive when determining how to construe a statute. Besides, since the election rules are apt to produce hardship any mitigation should be welcomed.

Limitation

In what circumstances is it reasonable to make a claim later than six months from the accident or death? Following the trend of earlier decisions it was held in *Sims* v. *Roscoe & Sons, Ltd.*, 31 B. W. C. C. 184, that progressive but latent osteo-arthritis discovered as such more than six months after disablement was a reasonable cause for delay. Likewise where, as happened in *Easterling* v. *Peek, Frean & Co., Ltd.*,

[1938] 2 K. B. 300, skin trouble was diagnosed after expiry of the period, the workman was held still entitled to make a claim. But in the last-mentioned case Scott, L.J., went even farther. In the opinion of the learned Lord Justice the workman was absolved from any obligation; neither in fact nor in law was he able to obtain a certificate earlier, and the question of reasonable cause did not even arise.

On the other hand, the delay was considered fatal in *Harris* v. *Dorman, Long & Co., Ltd.*, 159 L. T. 568. This was a hard case, incidentally showing the need for reform of the provisions relating to election; but Goddard, J., did not allow the hardship to influence his decision. The widow of a deceased workman had sued several contractors for negligence. Her action failed because she had impleaded the wrong persons. Thereupon the Judge was asked to assess compensation under section 29, but this application failed, since the original action had not been brought within six months of the death. Neither was this a case where the making of a claim was delayed by a reasonable cause. "The trend of authority is that, where the reason for a workman or his dependants refraining from making a claim is a consideration of his or their interests, and is in no way widened by his employer's knowledge or conduct, that is not enough to constitute reasonable cause for not complying with provisions of the Act."

Remedies against a Stranger

In *Att.-Gen.* v. *Arthur Ryan Automobiles, Ltd.*, [1938] 2 K. B. 16, a post office employee had been run down by the defendants' lorry. The Postmaster-General had paid him compensation amounting to £38, and had claimed indemnity from the defendants under section 30. The latter had paid the money into Court with a denial of liability, and the Attorney-General had taken the money out of Court. Subsequently the Postmaster-General paid a further £18 as compensation and again demanded a refund from the defendants, but the latter pleaded *res judicata*. The Court of Appeal held that they were bound to pay the further indemnity. This became payable whenever compensation was paid. In the words of Slesser, L.J., "the actual claim arises only when the payment is made in fact; and each payment gives rise to a separate right of action. . . . It is

quite impossible for an employer paying compensation to predict and to assess what sum will be required under the Act from him in future." The right course, therefore, is to claim indemnity from time to time. The first action determines in principle, once for all, the right to claim indemnity; the subsequent actions relate only to the amounts paid since the last action.

A number of cases dealt with details of the award; they hardly concern matters of principle; the practitioner will be interested especially in *Rees* v. *Powell Duffryn Associated Collieries*, 31 B. W. C. C. 28, and *Hughes* v. *Reed & Co.*, *ibid.*, p. 11.

Trade Unions

Two decisions on this subject deserve a brief reference. In *Evans* v. *National Union of Printing, Bookbinding and Paper Workers*, [1938] 4 All E. R. 51, the plaintiff absented himself from work without notice. So the employer complained to the union, who in turn instructed the workman to return to work. This he refused to do, without giving reasons. Thereupon disciplinary proceedings were begun which resulted in the plaintiff's expulsion, since under the rules he had "knowingly acted to the detriment of the interests of the union". The plaintiff sued, contending that the expulsion was *ultra vires*, but Goddard, J., held that it was not. By refusing to obey the union's instructions the plaintiff had committed an act of insubordination entitling the union to take the steps complained of. The plaintiff contended that the union was only entitled to withhold out-of-work benefit; however, it was held that this rule did not apply, since the plaintiff had not claimed any benefit.

Finally, *Miller* v. *Amalgamated Engineering Union*, [1938] 1 Ch. 669, must be mentioned. There Morton, J., analysed at great length the rules of the union, and came to the conclusion that it was indeed a trade union. When considering whether the association was unlawful at common law, a power to expel a member irrespective of the duration of his membership and the amount paid by way of contribution were strong evidence of unlawfulness. The present action was brought by the personal representatives of a deceased member for arrears of superannuation benefit, but the learned Judge dismissed the action on the ground that the Court had

no jurisdiction in the matter. The combined effect of sections 3 and 4 of the Trade Union Act, 1871, was to allow actions being entertained which would have been maintainable at common law, *i.e.*, if an association would have been lawful there. This was not the case here, and the present action was held to be "a legal proceeding instituted with the object of directly enforcing" an agreement covered by section 4, which was not enforceable in a court of law.

LITERATURE

Books

Redgrave & Owner's Factories, Truck and Shops Acts. Fifteenth edition. By Joseph Owner. 1939. Butterworth & Co., Ltd., and Shaw & Sons, Ltd. 1063 pp. 30s.

A new edition of this well-known work would be welcome at any time. It is almost indispensable at present now that we have on the Statute Book the new Factories Act which is a measure of extreme complexity and difficulty. Hence, everyone whose business it is to deal with industrial law will be grateful to the editor and the publishers alike for having produced so speedily a new edition which, although almost entirely new, maintains the high reputation of the preceding editions. A number of other works on the Factories Act were rushed out in order to meet the demand which normally arises for text-books when a new Act is passed, but *Redgrave* unquestionably maintains its position as the leading authority. A welcome innovation is the reduction in format of the book, which is now printed on India paper in a size which enables it to be slipped into the pocket. This increased portability has been achieved without any sacrifice of legibility or clearness of type.

The book is divided into six main parts, the first dealing with the Factories Act, 1937, and kindred Acts such as the Employment of Women, Young Persons and Children Act, 1920, the Lead Paint (Protection against Poisoning) Act, 1926, the Checkweighing in Various Industries Act, 1919, etc. This Part forms the most important section of the book and occupies more than 400 pages out of a total of about 1,000.

There is a short but excellent introduction to the new Act explaining in a lucid and succinct manner the principal

changes and extensions of the new law, and giving a short historical sketch of the preceding legislation.

The only criticism which can be made is that the case law is somewhat scanty, particularly on the subject of the fencing of dangerous machinery. The author has followed the desirable principle of omitting most of the earlier cases which have been reversed, improved upon or expanded by later decisions, but judicial precedent is so exceedingly important in connection with the employer's obligations in regard to fencing, that a fuller account of the cases since, say, 1900 would be an improvement, especially as some of the principles laid down by the Courts are by no means easy to reconcile.

Part II deals with the Truck Acts and covers six separate statutes. Part III is devoted to the Shops Acts, eight in number, and the Shops Regulations. Part IV deals with Regulations for Dangerous Trades; Part V, with Welfare Orders; and Part VI with miscellaneous Acts affecting persons employed in factories. This includes portions of the various Education Acts and the Children and Young Persons Act, 1933. The book is annotated throughout and the author does not hesitate to submit, out of his wide experience as Deputy Superintending Inspector of Factories, interpretations of the law which must be received with great respect.

W. A. R.

The Shops Acts Simplified. (English edition.) By A. F. Bew. William Hodge & Co., Ltd. 1938. 95 pp. 2s. 6d.

This little volume will be welcomed by laymen, and not a few lawyers. The author aims at summarising the contents of the seven Acts of Parliament relating to shops "in language which will be more easily understood than the statutes themselves". As far as can be seen this goal has been reached. A detailed index facilitates the use of the book.

Willis's Workmen's Compensation. Thirty-first edition. Butterworth & Co. cli, 1018 and 94 pp. 20s. net.

The new edition of this very useful book shows another substantial increase in volume. The general plan has proved satisfactory so that it has only been found necessary to add the recent judicial decisions. The output of these is so large that it becomes increasingly difficult to deal with them; and both practitioners and students will rejoice that their work has been made easier by the new *Willis*.

Road Haulage Wages Act, 1938. By H. F. R. Sturge. Sweet & Maxwell. iv and 116 pp. 7s. 6d. net.

This little book is intended to serve as a guide through the new Road Haulage Wages Act. It contains an introduction, where the history of road traffic legislation is briefly set out, followed by a statement of the law enacted in the present statute. This part is concluded by a few practical points for employers and workers. This introduction is valuable especially because it shows where in the framework of road traffic in general the wages question comes in, and how the latter is linked to the licensing system set up by earlier statutes. The author has obviously a great deal of inside knowledge which stands him in good stead when explaining the trend of legislation and the meaning of individual sections. Annotations are added to each section of the Act.

International Labour Office. Labour Courts. An International Survey of Judicial Systems for the Settlement of Disputes. Geneva. 1938. viii and 220 pp. 5s.

Compared with other branches of the law, industrial law is still very young. This fact explains the scarcity of literature in this country, apart from practitioners' books on current legislation. It is all the more gratifying that research is done by the International Labour Office, where information is collected from all over the world. The present study maintains the high level of the anonymous books. It is more than a mere survey of the Labour Courts functioning in various countries, though some 150 out of the 220 pages are devoted to this task. For the student perhaps more valuable is the first part of the book entitled "Comparative Legislation" and describing the motives for the institution of Labour Courts, as well as common features of constitution, composition, jurisdiction, and procedure of the tribunals. It is rightly stressed that such Courts have sprung up not so much because labour law was so difficult that it required specially trained Judges, but rather because the convenience of the workman made such tribunals desirable. On the one hand workmen, as any other class of persons, wish to be judged by their peers, an interesting argument in a modern world. On the other hand, the workman, dependent as he is on his wages, can less than other people afford the law's delay, and claims a speedy decision at practically no expense.

A few interesting pages deal with the distinction between "disputes about rights" and "disputes about interests", a problem common both to industrial and international law, and reference is in this respect made to literature on the latter subject. Some countries allot to the labour Judge the functions of Judge and arbitrator, others are content with giving him jurisdiction as a Judge only.

The survey expressly disclaims the intention to judge the merits of any individual system. According to the author the answer to the question, which is the best system of Labour Courts, must be: "The best system is undoubtedly that which corresponds the most adequately to the political, administrative and judicial institutions of the country concerned."

International Labour Office. International Survey of Legal Decisions on Labour Law, 1936–37. Twelfth year, 1938. lviii and 533 pp. 10s.

The same praise is due to this volume as was given to its predecessor last year. Plan and information follow precedent which has proved useful in earlier publications. The English lawyer will be specially interested in the German, Italian, and French decisions on holidays with pay; he will also profit by a comparison of the attitude taken by various judiciaries to the consequences of disregarding safety provisions. The student of jurisprudence will again be repaid for reading many of the cases; he will find, especially in Germany, that the distinction between statute, decree, and command of the Fuehrer has gone, and how little legal guarantee there is for the in itself far advanced labour law.

Cross-references to decisions in earlier volumes facilitate the use of the collection, though sometimes decisions are reported so briefly that it is difficult to follow the argument.

Articles

Wrecks and Wages. 185 L. T. 315. Deals critically with the Merchant Shipping (International Labour Conventions) Act, 1925, which provides for wages to be paid to seamen who have lost their job "by reason of a wreck".

The Truck Acts. 185 L. T. 167.

Government Regulation of Trade Unions in Great Britain. By J. Henry Rothschild, 2nd. 38 Columbia Law Review, pp. 1 *et seq.* Contains an interesting discussion of the English laws which are at present widely canvassed in the United States in view of the political development there.

Hospitals and Trained Nurses. By A. L. Goodhart. 54 L. Q. R. 553. Deals, *inter alia*, with *Wardell* v. *Kent C. C.*, reviewed *supra*, p. 283.

CRIMINAL LAW

1938 was a year of average importance in this field. The Bills to which attention was drawn in the *Annual Survey*, 1937, duly became law, but Sir Samuel Hoare's very important proposals for criminal law reform are still being discussed in Parliament and consideration of them must be left until next year. The subject of official secrets raised quite a considerable amount of controversy during the year and reforms are promised in that direction.

LEGISLATION

The *Evidence Act*, 1938, is discussed at length elsewhere. It should be observed that sections 3 and 4 apply to criminal as well as to civil proceedings; they relate, respectively, to the subjects of proof of an instrument to the validity of which attestation is requisite and presumptions as to documents proved, or purporting, to be not less than twenty years old.

1 & 2 Geo. 6, c. 28. Evidence.

By far the most important Act of the year in this Section was the *Administration of Justice (Miscellaneous Provisions) Act*, 1938, which carries out many of the recommendations of the Bodkin Committee on Courts of Quarter Sessions and effects other desirable changes in procedure. Section 1 provides that the Court of Quarter Sessions for any county, or for any division or part of a county, may at any time apply to the Lord Chancellor for the appointment as chairman or deputy chairman (the rubric reads "and" for "or") of a person who is or has been a barrister or solicitor of not less than ten years' standing having such legal experience as to qualify him in the opinion of the Lord Chancellor to act as such. A proviso relates to the desirability of appointing, where practicable, a person having local connections, and, in Wales, a person able to speak the Welsh language. The term of office, and the conditions as to retirement, of such person may be specified in his appointment, and, if he is not already a justice for the county, he shall become one *ex officio*. The section does not apply to the London County Quarter Sessions, nor to the County Palatine of Lancaster, nor to the Court of the recorder of any borough having a separate Court of Quarter Sessions. It will be noted that the appointment

1 & 2 Geo. 6, c. 63. Administration of justice. Chairmen of quarter sessions.

of trained lawyers is not made compulsory, but the situation has already been substantially improved under the new Act.

Payment.

Neither does the section provide for payment, but section 4 provides for an agreement which may be made at any time between the Court and the county council for a salary to be paid; and the agreed salary shall be paid if approved by the Lord Chancellor. A consequential amendment of considerable importance provides that at any session a Court of Quarter Sessions presided over by a legally qualified chairman of the Court (as defined in the Act) shall have jurisdiction to try the following matters not previously within the jurisdiction of Quarter Sessions: destroying, etc., goods in process of manufacture and machinery (Malicious Damage Act, 1861, s. 14); concealment of birth (Offences against the Person Act, 1861, s. 60); acts of indecency between males (the Criminal Law Amendment Act, 1885, s. 11); several offences of forgery, or in the nature of forgery, under the Stamp Duties Management Act, 1891, s. 13, the Forgery Act, 1913, ss. 2 (2) (*a*) and 4, and the Criminal Justice Act, 1925, s. 36 (forgery of passport); false statements on oath otherwise than in a judicial proceeding, or relating to marriages, or as to births or deaths, false statutory declarations, or false declarations, etc., to obtain registration, etc., for carrying on a vocation, under the Perjury Act, 1911, ss. 2—6; offences under the Coinage Offences Act, 1936, other than those under sections 1 (1) (*a*), 2, 9 (1) and (2), and 10; conspiracies to commit offences punishable on summary conviction; offences of forgery of documents or things, being offences triable on indictment or by a Court of summary jurisdiction, except offences under the Official Secrets Act, 1920, s. 1; and personating soldiers, etc., under the Chelsea Hospitals Act, 1826, and the Army Prize Money Act, 1832. Incidental provisions have had to be made to meet the case of committals for these offences to Courts of Quarter Sessions which, for the time being, have no power to try them. Section 3 enacts a comprehensive provision giving Courts of Quarter Sessions power to adjourn the sessions generally or to a date to be subsequently fixed by the chairman or otherwise as the Court ordering the adjournment may direct, but consequential provisions had to be made for cases where the adjourned sessions are not resumed, or are resumed but not concluded before the date fixed for the next general or quarter sessions under the Criminal Justice Act, 1925, s. 22 or 23.

Extended jurisdiction of quarter sessions.

Assizes and Committal.

Under section 5, the power exercisable by the Lord Chief Justice, with the concurrence of the Lord Chancellor, to direct that assizes shall not be held at a place on circuit where there is no substantial amount of business to transact, shall be exercised in his sole discretion by the Judge going the circuit, or, when two Judges go together to that place, by the senior of them. To relieve the Assize Courts, section 6 gives a statutory emphasis to the rule that, where justices have the power to direct that a person charged with an indictable offence triable at quarter sessions shall be tried instead at the next Assize Court, they should not do so unless there are unusually grave or difficult circumstances attending the case or serious delay or inconvenience would be occasioned by committal to quarter sessions. Despite circulars drawing their attention to this rule, magistrates have been prone to overlook it in the past. With the same object, the section repeals the Larceny Act, 1916, s. 38, which required committals for burglary in certain circumstances to be made to assizes and not to quarter sessions; and section 14, proviso (*a*) of the Criminal Justice Act, 1925, is sensibly and elegantly amended to allow committing justices to commit to assizes or quarter sessions at some convenient place other than that to which the case would normally go if they think it unlikely (not "are satisfied") that the "normal" Court will not meet within one month of the date of committal.

The prerogative writs.

Section 5 of the Administration of Justice Act, 1933 (see the *Annual Survey*, 1933, p. 267) is repealed, and sections 7 and 8 of this Act make provisions for the prerogative writs of mandamus, prohibition and certiorari to cease to be issued by the High Court. Their functions in future are to be discharged by orders of mandamus, prohibition and certiorari, respectively. This simplification of procedure is enhanced by the rule that no return shall be made to any such order and no pleadings in prohibition allowed, but that the order shall be final, subject to any right of appeal. The High Court is to have the power by order of mandamus to require justices, or a Judge or officer of a county court, to discharge some duty relating to their respective offices, or to require a summary Court, or a Court of Quarter Sessions, to state a case for the opinion of the Court. Informations in the nature of quo warranto to restrain a person from acting in an office in which he is not entitled are abolished and the procedure of an injunction substituted for them. Section 10

provides for rules of Court to be made prescribing the procedure for cases where these orders are sought and requiring, generally, for leave to be obtained before the application is made for such order or before such proceedings are commenced; when leave is obtained, no relief shall be granted, and no ground relied upon, except with leave of the Court, save the relief and grounds specified when the application was made.

High Court; trials of indictments. Removals, etc.

Section 11 provides generally that no indictment or inquisition shall be tried in the King's Bench Division or removed into that Division for trial, save "trials at bar" and indictments found by a County of London and County of Middlesex grand jury under the Administration of Justice Act, 1933, s. 4. Even the former may be ordered to be tried at the Old Bailey before three Judges of the King's Bench; the latter may be directed to be tried in that Court without the direction about three Judges. Section 11 (3) meets the difficulty which arose at the time of the trial of the three Welsh Nationalists (see the *Annual Survey*, 1936, p. 315), and provides that, where it is expedient in the interests of justice, the High Court may direct an indictment or inquisition to be removed to some specified assize, or quarter sessions, as the case may be, other than that at which it should normally be tried. It will be recollected that in 1936 the Divisional Court held that under the Central Criminal Court Act, 1856, s. 8, it could only direct the trial to be removed to the Old Bailey. Consequential provisions are made relating to costs and other matters. Outlawry proceedings, the exhibiting of articles of the peace in the High Court, and criminal informations, other than those filed *ex officio* by the Attorney-General, are abolished (section 12). The rest of the Act deals mainly with civil matters.

Infanticide. 1 & 2 Geo. 6, c. 36.

The difficulties which had arisen about the interpretation of the Infanticide Act, 1922 (see the *Modern Law Review*, Vol. 1, pp. 203, 269; Vol. 2, p. 229) are now removed by the enactment of the *Infanticide Act*, 1938, for which the major credit should go to Lord Dawson of Penn. The Act effects two notable amendments: the time period within which the charge of infanticide may lie is extended to the upward limit of twelve months, instead of the three or four weeks to which the Court of Criminal Appeal had reduced it under the 1922 Act; the mental disturbance from which the mother is suffering may now be the result not only of child-birth but "of

lactation consequent upon the birth of the child". The alternative verdict machinery of the old Act is preserved save that the reference to the offence of cruelty to a child is omitted as unnecessary after the Children and Young Persons Act, 1933, s. 1 (4). A not too clearly drafted clause relates to the proviso to the Offences against the Person Act, 1861, s. 60 (which provides for the alternative verdict of concealment of birth on an acquittal on a charge of murder); it enacts that for the purposes of the proviso to that section "a child shall be deemed to have recently been born if it had been born within twelve months before its death". It appears that this new definition is made for all purposes and not merely for the purpose of an alternative verdict of concealment upon the acquittal of a woman upon an indictment of infanticide.

Food and Drugs. 1 & 2 Geo. 6, c. 56.

The big consolidation measure of the year was the *Food and Drugs Act*, 1938, which consolidates with amendments "certain enactments relating to food, drugs, markets, slaughter-houses and knackers' yards". It consists of 103 sections, fills ninety pages of the Law Reports, repeals seventeen English statutes and affects nineteen others. But it still leaves room for further consolidation.

Children and young persons. 1 & 2 Geo. 6, c. 40.

The *Children and Young Persons Act*, 1938, extends the powers of juvenile Courts by (1) enlarging their powers under the Act of 1933, s. 64, to make orders committing a child or a young person to the care of any fit person, whether a relative or not, who is willing to undertake the care; (2) enabling them to make a supervision order relating to a child or young person under eighteen instead of an order committing him to the care of a fit person under section 84 of the main Act; (3) enabling a Court acting under the Education Act, 1921 (on complaint of non-compliance with a school-attendance order) to make a supervision order, either with, or without, a committing order; (4) extending their powers to attach provisions to supervision orders as they see fit (with certain reservations) for effecting the purposes of such orders; (5) giving them powers to deal with a child or young person who becomes in need of medical attention while under detention. The Act also deals with the revised constitution of juvenile Courts in the Metropolitan area. The protection of young persons is also extended by the *Young Persons (Employment) Act*, 1938, described in the Industrial Law Section, which includes a number of provisions creating

1 & 2 Geo. 6, c. 69.

criminal offences: sections 1 (8), 2 (3) (4), 4, 10 (4) (5) (6). Sections 11—14 amend the Shops Act, 1934.

State regulation of industry and commerce.

1 & 2 Geo. 6, cc. 17, 30, 41, 44, 52, 58, 70, 71, 22.

The heavy spate of legislation relating to State regulation of industry and commerce still continues and a number of 1938 Acts of this nature contain the types of clauses which have now become familiar and to which attention has been drawn in successive issues of this *Survey*. Little purpose is served by repeating them seriatim again this year, but they may be found in the following enactments: the *Cinematograph Films Act*, 1938, ss. 8—18, 19, 22, 33, 38, 39, 42; the *Sea Fish Industry Act*, 1938, ss. 6, 12, 18, 19, 25, 26, 29, 38, 43, 47, 49, 53, 54, 60; the *Baking Industry (Hours of Work) Act*, 1938, s. 10; the *Road Haulage Wages Act*, 1938, ss. 7, 10, 12; the *Coal Act*, 1938, ss. 14, 48, 53, 54; the *Holidays with Pay Act*, 1938, s. 1; the *Bacon Industry Act*, 1938, ss. 8, 9, 11, 16, 34—37, 42, 45, 49; the *Chimney Sweepers (Repeal) Act*, 1938. The *Trade Marks Act*, 1938, is a consolidation measure; the penal provisions may be found in sections 59—61.

Miscellaneous.

1 & 2 Geo. 6, cc. 5, 21, 37, 72, 12, 26, 51, 53, 54.

The quail ("the bird known as *Coturnix coturnix*") is protected by the *Quail Protection Act*, 1937. The vexed question of orders for the destruction of dogs is dealt with in the *Dogs Amendment Act*, 1938. Many a young life may be saved by the *Street Playgrounds Act*, 1938, which creates new offences in sections 1 and 3, and another Act relating to life-saving is the *Fire Brigades Act*, 1938, which creates several offences: sections 2, 3, 14. Refusal to disclose information, or the unauthorised disclosure of information, may constitute offences under the *Population (Statistics) Act*, 1938, and failure to provide a rent-book may put landlords in jeopardy under the *Increase of Rent and Mortgage Interest (Restrictions) Act*, 1938. The smell of war attaches to the *Essential Commodities Reserves Act*, 1938, ss. 1, 4. Owners and hirers may commit penal offences under the *Hire-Purchase Act*, 1938, ss. 6, 7. A professional registration offence of the usual nature is created by the *Architects Registration Act*, 1938, s. 8.

CASE LAW

Substantive offences.

The case which drew the greatest public attention and interest during the year was *R.* v. *Bourne*, [1938] 3 All E. R. 615, where the defendant, in effect, challenged the Courts

to declare the law on abortion in cases of "necessity", as defined by the medical profession, or a considerable section of it. The facts of the case, as well as some history of the crime, are given in an article in the *Modern Law Review*, Vol. 2, p. 126. The views stressed in the case, and the points established by it, may be briefly summarised as follows. (1) Macnaghten, J., said that the word "unlawfully" in the Offences against the Person Act, 1861, s. 58, must be given some meaning although it is not defined in the Act. Consequently, there must be some procurements which are lawful. (2) It was generally admitted that if the operation is done *bona fide* to save the life of the mother the defendant is entitled to an acquittal. This had not been previously so authoritatively established as the Judge and counsel appeared to treat it. (3) This case constitutes a precedent for the view that the *bona fide* object of avoiding the practically certain physical or mental breakdown of the mother will afford an excuse. (4) The burden of proving that the procurement of abortion is not lawful is upon the Crown. (5) The case does not go beyond establishing these propositions and, even within the limits of the matters of defence specified above, "each case depends upon its own particular facts, and the circumstances of each case must vary infinitely". (6) The safeguards suggested in the summing-up against an abuse of the law are threefold: (i) the limitation of the defences to those specified; (ii) the statement that members of the medical profession alone are the persons who can properly perform such an operation; (iii) the insistence on the requirement of good faith even on the part of medical men; one of the *indicia* of good faith will be joint consultation with another member of the profession. (7) There are some loose *dicta* in the summing-up which must not be taken too literally. On one of them the argument might be based that it would be manslaughter on the part of a doctor who refused to discharge the duty of procuring an abortion if death followed upon it. The case is of considerable interest not only upon the law of abortion but also upon the defence of necessity generally.

Abortion and necessity.

In *R.* v. *Harrison and Others*, 26 Cr. App. R. 166, four youths, all under the age of twenty-three years, were charged with having had carnal knowledge of a girl under sixteen years of age. The evidence given for the prosecution showed that the girl appeared to be over sixteen and the jury found

Carnal knowledge.

that the youths were ignorant of the law and gave no thought at the time of the offence to the age of the girl. On appeal against conviction they sought to argue that they should have had the benefit of the defence contained in the proviso to the Criminal Law Amendment Act, 1922, s. 2, as amended by the Criminal Law Amendment Act, 1928, s. 1, which says that it shall be a valid defence to a defendant under twenty-three years of age on the first occasion on which he is charged with an offence under the section that he had "reasonable cause to believe that the girl was over the age of sixteen years". Following *R.* v. *Banks*, [1916] 2 K. B. 621, the Court of Criminal Appeal held that the defence was inapplicable in this case. The phrase "had reasonable cause to believe" means "had reasonable cause to believe, and did in fact believe".

Incest.

In *R.* v. *Hemmings*, [1939] 1 All E. R. 417, a married woman during the lifetime of her husband bore a daughter who was registered as the child of her husband. Years later the husband died and the woman married the appellant, who was accused of incest with the girl. The Court of Criminal Appeal held that it was not sufficient evidence to sustain the charge that the appellant had spoken of the girl as his daughter. The presumption of legitimacy applied; there was no particle of evidence that the mother had committed adultery with the appellant. It would not have been enough to say that he had had intercourse with the woman. In this case there was not even evidence that the husband did not have intercourse with his wife when she conceived.

Bigamy.

One of the most interesting events of the year was the rejection by the High Court of Australia in *Thomas* v. *The King*, 59 Commonwealth Law Reports 279 (Latham, C.J., Rich and Dixon, JJ., with Starke and Evatt, JJ., dissenting) of the authority of the English case of *R.* v. *Wheat and Stocks*, [1921] 2 K. B. 119. An account of the case may be found in the *Journal of Criminal Law*, Vol. 2, p. 601, and Professor G. W. Paton discusses the subject in the *Canadian Bar Review*, Vol. 17, p. 94.

In *R.* v. *Morrison*, [1938] 3 All E. R. 787, the appellant had been convicted of bigamy for going through a form of marriage with I. in 1938 when he had already gone through a form of marriage with H. five days earlier. The defence alleged that the marriage with H. was invalid as she had a husband living. The evidence on the question was that H.

went into the witness-box and swore that she had married Mr. H. in 1919, that they had gone to Canada, and that she had last seen Mr. H., then forty-four years of age, in Canada, in 1928. She swore that when she and the appellant were married in 1938 she informed the officiating Registrar of these facts and that the Registrar told her it would be all right and that she could properly describe herself as a widow. The prosecution urged that the marriage between the appellant and H. was valid and the defence denied that the prosecution had sufficiently established that it was a good and valid marriage. After conviction, the appellant urged that the Judge had misdirected the jury by putting the onus of disproof of the legality of the marriage with H. on him, but the Court of Criminal Appeal found that the direction was quite correct as it was in accordance with *R.* v. *Willshire* (1881), 6 Q. B. D. 366, namely, that where the legality of the first marriage is dependent on facts, *e.g.*, proof of the subsistence of another marriage, it is a question for the jury to decide on the evidence what are the facts and what they believe in the matter and that if they have any doubt about the first marriage they ought to acquit the prisoner.

Lord Hewart, L.C.J., sprang a fine surprise on most lawyers by his judgment in *R.* v. *Treanor*, [1939] 1 All E. R. 330. The facts were: T. married A in 1916 and deserted her in 1918. The prosecution could not prove that since that time he knew that A was alive. In July 1930 he went through a form of marriage with B. He deserted B in 1937 and went through a form of marriage with C in January 1938. The Court of Criminal Appeal held that the defence of seven years' continuous absence applied to the "marriage" with B but that it could not apply to the "marriage" with C, as the proviso to the Offences against the Person Act, 1861, s. 57, only speaks of the defence applying to "any person marrying a second time" and not "a second or subsequent time". The Crown advanced the analogy of the defence only available once to a man under twenty-four in the proviso to the Criminal Law Amendment Act, 1922, s. 2, as amended in 1928. Lord Hewart obviously accepted this as a correct analogy. This decision may be a salutary one but it is one of the most surprising pieces of statutory interpretation done in the Courts for some years. A ninety-ninth party may be "a third party" and a third marriage may be a marriage "a second time". In view of this decision, what has become

of the old rule of interpreting ambiguous penal statutes in favour of the prisoner? If Lord Hewart's view is correct, surely something would have been heard of it in the Courts before now.

Demanding with menaces.

The complexities of the Larceny Act, 1916, ss. 29—31, led to confusion in the trial of *R.* v. *Bernhard*, [1938] 2 K. B. 264, where the prisoner was charged with demanding with menaces with intent to steal under section 30 of that Act. The appellant, a Hungarian, had been the prosecutor's mistress for some time and, after the immoral association had ceased, he promised to pay her £20 a month for a year. He paid her £80 and then, when he sent her no more, she followed him to this country and threatened to expose him if he did not pay the rest. She swore that she believed that she was entitled to the money and that she had taken the advice thereon of a lawyer of her own nationality. Lord Hewart, L.C.J., despite many opportunities presented to him by an obstinate juryman, resolutely refused to admit that she might have a defence to the charge on these facts; he called her claim "a claim of wrong" and not "a claim of right" and said that "there cannot be a claim of right made in good faith within the meaning of the Larceny Act, 1916, so as to answer an allegation of stealing if the claim is one arising out of an immoral consideration and inconsistent with the terms even of a bargain made for an immoral consideration". Later he said: "You cannot have a claim of right where the circumstances are such as to exclude the possibility of a legal claim. . . . The question is not whether she thought something or other. The question is whether on the materials it was open to her to think she had a real claim of right and made in good faith." The Court of Criminal Appeal had little difficulty in quashing the conviction on the ground of wrong direction. A long series of decisions establishes that a person has a claim of right if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact. The evidence could not sustain the view that the prisoner could not possibly have believed that she had not an honest claim. "But however strong, and however well justified, may be a Judge's view that there is a preponderance of evidence against the defence of a claim of right, the question whether that defence is negatived by the evidence must be left as a question of fact to the jury." Moreover, the alleged

contract was not made for an immoral consideration. It is an elementary proposition of the law of contract that it was merely unenforceable for want of consideration; the immoral association had ceased. A Hungarian could not be convicted for not having an appreciation of the distinction between a parol contract and one under seal. In fact, this contract made in France might not have depended on English law at all. The case draws attention to the unsatisfactory state of the law on the blackmail offences and the variances in definition between the various sections which are very confusing. As it is understood that a detailed study of this matter may soon appear, it would serve little purpose to dwell at length on it here.

False pretences.

On the subject of obtaining by false pretences, attention should be drawn to the strong doubts cast by Dr. C. K. Allen on the correctness of *Berg* v. *Sadler*, [1937] 2 K. B. 158, as an authority on the question of what constitutes this offence—*Law Quarterly Review*, Vol. 54, p. 201.

The short point in *R.* v. *Alexandra*, 26 Cr. App. R. 116, was that an allegation that the prisoner falsely pretended "that he honestly required a sum of money only to secure himself against any breach by an employee of a certain contract" is a charge of the representation of an alleged existing fact sufficient to support an indictment for obtaining the money by false pretences from the employee. Counsel for the appellant strongly contended that the representation charged was one relating to intention with regard to the future user of the money which he was obtaining, but the Court rejected the contention very summarily.

Receiving.

In *R.* v. *King*, [1938] 2 All E. R. 662, a case for some reason not reported in the *Criminal Appeal Reports*, K. had been convicted, together with B, of receiving stolen goods. The police visited the flat of B to inquire about a stolen fur coat; B at first denied any knowledge of the matter but later admitted the theft and produced a parcel containing the fur coat. Whilst a policeman was examining the parcel, the telephone bell rang and the police heard B say "Come along as arranged". The police suspended operations; then K. arrived; the police in hiding heard him say "I have come for the coat"; B handed the coat to K.; K. was arrested. The Court of Appeal agreed that the coat had not fallen into the possession of the police and that K. could be said to have been in possession of property which was still "stolen

property" at the time. There is no indication in the judgment of the Court why it considered that the police had not had possession of the coat, and the learned Editor of the *Law Quarterly Review* (see Vol. 54, p. 468) very rightly argues that it is most difficult to reconcile the decision with the authorities on possession.

A suggestion in the summing-up in *R.* v. *Tennet*, [1989] 1 All E. R. 86, that it was sufficient on a charge of receiving to prove that the prisoner came to know that goods were stolen goods at any time during which he was in possession of them, sufficed to upset the conviction.

Share-pushing.

The real interest of *R.* v. *Findlater*, 27 Cr. App. R. 24, belongs to the field of Company Law, because it discusses the difficult question of what is a "debenture", but the case deserves mention here because it constitutes a hard blow against a pernicious form of share-pushing prominent in recent years, namely, by selling "units" of land or premises on which it is proposed to grow apples, or mushrooms, or some other plants, fruits or vegetables for sale, with extravagant promises of guaranteed profits. The certificates issued in this case were held to be "debentures" (though not "shares") within the meaning of the Companies Act, 1929, s. 856. The appellant, a director of one of these mushroom companies, was held to have been rightly convicted of conspiring to contravene the section and also of causing and procuring canvassers to go from house to house offering debentures in contravention of the section. His ignorance of the illegality of the proceedings was held to be no defence to the charge of conspiracy and he had sufficiently "caused or procured" the canvassers to commit the illegal acts, although he had never met them, by acquiescing in the system when he joined the company, correcting the "literature" for them, and being aware of the fact that the company, for a directorship in which he was paid £750 a year, was being financed by the sale of the "units".

Official Secrets Act.

The decision of the Divisional Court in *Lewis* v. *Cattle*, [1988] 2 K. B. 454, raised a storm of protest which has already resulted in a promise by the Home Secretary of an early reform of the law. The appellant, a journalist, had been convicted of an offence under the Official Secrets Act, 1920, s. 6, on the following facts. The Stockport police issued a warrant for the arrest of a man on a charge of conversion and three days later issued a circular to other police forces

relating to the matter. The appellant was the author of an article which appeared three days later in the *Daily Dispatch* and which was in terms almost identical with those of the police circular. The circular was meant to be for the police only, but no intimation to that effect was sent with it. At Stockport such a document would be dealt with under close supervision and as confidential, but there was no evidence given of the general practice in the other towns to which it had been sent, nor was there any evidence of how this particular document was dealt with elsewhere than in Stockport. It was admitted that the police frequently gave information of this kind to the Press, but no instructions were given to do so on this particular occasion. Over a month later, the appellant had a visit from the Stockport police superintendent, who informed him that he had the authorisation of the Attorney-General to make inquiries under section 6 of the 1920 Act and that he required him to give him the name of his informant. The appellant refused to give any information as to the source from which he had obtained his material. Under section 2 (1) of the 1911 Act, "If any person having in his possession or control any . . . information . . . which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained owing to his position as a person who holds . . . office under His Majesty . . . (*a*) communicates the . . . information to any person, other than a person to whom he is authorised to communicate it, . . . that person shall be guilty of a misdemeanour." Section 6 makes it a misdemeanour for a person to refuse to give on demand to a chief officer of police, etc., any information in his power relating to an offence or suspected offence under the 1911 or 1920 Act. The trial justices found (*a*) that a police officer was in the service of His Majesty, (*b*) that the circular was confidential, (*c*) that there were reasonable grounds for suspecting that it was confidential, and (*d*) that the appellant unlawfully failed to give information in his power relating to a suspected offence under section 2 of the 1911 Act, contrary to section 6 of the 1920 Act. Lord Hewart, delivering the judgment of the Divisional Court, agreed. He considered that every police officer in England and Wales holds the position of constable and that within his constable-wick he has all the duties and rights conferred by common law or statute on the holders of that office. "He is required to take an oath of office and

his primary duty is to preserve the King's peace." From that proposition his Lordship took the direct step, without further argument, to holding that "it follows that a police officer is a 'person who holds office under His Majesty' within the meaning of the Official Secrets Acts". His Lordship briefly stated that everyone who is "in the service of his Majesty" does not necessarily "hold office under his Majesty", and *vice-versa*. It thus fell to his Lordship, the Attorney-General in the Government responsible for the 1920 Act which guaranteed that it was not meant to apply to this sort of case, to maintain the conviction of the journalist.

Abandonment of children.

The appellant in *R.* v. *Whibley*, 26 Cr. App. R. 184, being aggrieved with a juvenile Court, left his five children under the age of sixteen at the Court. The Court of Criminal Appeal held that, even assuming his act amounted to an abandonment, he could not possibly be rightly convicted under the Children and Young Persons Act, 1933, s. 1 (1) and (3), because it was not an abandonment "likely to cause unnecessary suffering or injury to health".

Vagrancy.

The respondent in *Batty* v. *Lee*, 159 L. T. 575, was charged with unlawfully running away from a certain parish, leaving his wife and child, whereby they became chargeable to the local public assistance committee. It was admitted that there was then in existence a maintenance order against the respondent made by another Court of summary jurisdiction at the instance of the wife, and the justice accepted the contention that this fact was sufficient to absolve the respondent, and he refused to hear further evidence. The Divisional Court held that he was wrong in law and that the existence of the order was in no way inconsistent with the commission of an offence under the Vagrancy Act, 1824, s. 4. The magistrate must hear the evidence and decide whether in fact the respondent had failed to maintain his wife or children in a manner constituting the offence.

Barratry. Seamen.

Reference might here be made to the view of Porter, J., as he then was, in *Compania Naviera Bachi* v. *Hosegood*, 158 L. T. 356, that for the purposes of "barratry" in a charterparty the commission of a crime is not necessary. In *Robson* v. *Sykes*, 54 T. L. R. 727, thirteen seamen, who had refused to sail on a ship to ports within the war zone in Spain, were held not guilty of having combined to impede the navigation of a ship, they being seamen lawfully engaged to serve in the ship, contrary to the Merchant Shipping Act,

1894, s. 225 (1) (*e*). Although the articles were signed after the outbreak of the civil war, the Court found, in the circumstances of this case, that the seamen were justified in refusing to go to Spain although it was within the zone specified in the articles. The particular voyage was one involving danger of capture or interference by the belligerents and it was something outside the scope of the original agreement.

Common lodging-house.

A decision which occasioned a little surprise was that of the Divisional Court in *People's Hostels, Ltd.* v. *Turley*, [1939] 1 K. B. 149, where the appellants were charged with having kept a common lodging-house without being registered as the keepers thereof, contrary to the Public Health Act, 1936, s. 236. For fifty-nine years the premises had been so registered and provided accommodation by night for 200 poor persons. Until the end of 1937 the lodgers paid 10d. a night but thereafter the charge was altered to 5s. 6d. a week, and the appellants contended that the change to the minimum weekly contracts, with payment in advance, took the premises outside the definition in the Act—"a house . . . provided for the purpose of accommodating by night poor persons, not being members of the same family, who resort thereto and are allowed to occupy one common room for the purpose of sleeping or eating". The Divisional Court agreed with the convicting justices that the change did not operate to exclude these premises. There had been a considerable amount of controversy before 1936 as to what constitutes a common lodging-house, but there was no definition of it in any English statute, though the Court of Appeal in *Parker* v. *Talbot*, [1905] 2 Ch. 643, linked up with the English Acts a definition found in an Irish Act which made the length of letting a matter of vital importance. The Court unanimously agreed that it was difficult to believe that the framers of the 1936 Act did not have the matter in mind. In view of the omission from the 1936 definition of any reference to the period of letting, it must be taken that the intention was to exclude that matter from consideration. The conviction was, consequently, upheld.

Shops. Food and drugs.

In *George Hotel (Colchester), Ltd.* v. *Ball*, 159 L. T. 85, the appellants were charged and convicted of not allowing the statutory half-holiday to a waiter in their employ, contrary to the Shops Act, 1912, s. 1. The waiter was employed in the dining-room of an hotel, having accommodation for some forty residents, in which meals could be served

to about fifty persons at the same time. The proportion of meals served to residents and to non-residents was approximately 37 per cent. to 63 per cent. The justices found that the hotel was mainly a residential one, that a portion had been opened to non-residents, that the waiter in question was mainly employed in serving non-residents, and that he was a shop assistant within the meaning of the section. The Divisional Court held that it was perfectly open to the justices to convict on these facts; a portion of a residential hotel may be a shop—"any premises where any retail trade or business is carried on".

Considerable dissatisfaction has been expressed with the Shops (Sunday Trading Restriction) Act, 1936, in several quarters. In *L.C.C.* v. *Lees*, [1939] 1 All E. R. 191, Lord Hewart, C.J., subjected the Act to withering criticism; more care should have been taken to avoid ambiguity in its scheme and its contents; an Act applying to hundreds of small shopkeepers was presented "for their bewilderment"; it might be possible, but it would not be easy, to compress in the same number of lines more opportunities for doubt and error; not often in the course of half a century of experience of the law had his Lordship had the opportunity of endeavouring to come to close quarters with such a piece of legislation. To put it colloquially, the Court "threw up the sponge" in trying to decide whether the magistrate below had correctly applied this legislation or not. Humphreys, J., remarked in *L.C.C.* v. *Davis*, 54 T. L. R. 845, where newly baked rolls or newly baked bread were held to come within the expression "newly cooked provisions" in the Shops (Hours of Closing) Act, 1928, and, therefore, were held to be lawfully saleable after 8 p.m., that "there is almost no nonsensical proposition which might not seriously be put forward as the result of looking at these innumerable exceptions" to the Act, which, no doubt, were inserted through the efforts "of a number of persons elected from different parts of the Kingdom, with special interests in their own particular constituencies". (His Lordship admitted that there must be "some particular reason for dealing with tripe, with which I am not familiar"!) In *Cant* v. *Harley*, [1938] 2 All E. R. 768, the respondents had been acquitted on the charge of being in possession of tuberculous meat contrary to the Public Health Act, 1875, s. 117, as extended by the Public Health Acts Amendment Act, 1890, s. 28. By section 116 of the 1875 Act the onus

of proof that the meat was not exposed or deposited for sale, or was not intended for the food of man, is placed upon the party charged. The magistrates acquitted the respondents on the ground that the evidence adduced by them to discharge this onus of proof was "very probably true", and that they were not satisfied beyond reasonable doubt that the meat was on the premises for the purpose alleged by the prosecution. The Divisional Court was unanimous in the view that the magistrates were wrong in law; they had applied the ordinary rules of proof to an exceptional case where the defence has to prove beyond doubt that the foodstuffs were not in their possession, etc., for the purposes alleged. A similar onus of proof of a matter of defence may be found discussed in *Marshall* v. *Matthews*, [1939] 1 All E. R. 156, a case dealing with the Sale of Food (Weights and Measures) Act, 1926, s. 6.

Gaming and gaming houses.

In *Dalton* v. *Adelphi Club, Ltd.*, [1938] 4 All E. R. 556, the Divisional Court held that for the purposes of prosecution under the Gaming Houses Act, 1854, s. 4, stud poker is an unlawful game. It may be a game of skill, but it is not a game of "mere skill"—the test laid down in *Jenks* v. *Turpin*, 13 Q. B. D. 505. *R.* v. *Salisbury*, [1939] 1 All E. R. 250, affirmed the rule that it is the duty of the Judge, and not of the jury, to decide whether or not a game is unlawful. *R.* v. *Milne*, 27 Cr. App. R. 18, follows *Samuel* v. *Adelaide Club*, [1934] 2 K. B. 69, in the view that it is sufficient to support a conviction of keeping a betting house under the Betting Act, 1853, s. 8, that there is some tacit arrangement between the bookmaker and the owner or keeper of the house, in pursuance of which members telephoned to the bookmaker. It is not necessary to show that the bookmaker has been procured by the owner or keeper to carry on his betting with the members. The fact that the bookmaker makes his bets by regular telephonic communications with the premises does not distinguish the case from that where he actually enters the premises. An appeal is pending.

Dangerous machinery.

There was not the same flood this year of dangerous machinery cases as there was last year. *Atkinson* v. *Baldwin*, 158 L. T. 279, may briefly be mentioned as a case dealing with the exceptions to liability under the Factory and Workshop Act, 1901, s. 10.

Traffic.

There was the usual quota of cases dealing with traffic offences, with a rare reminder in *West Riding Cleaning Co.* v. *Jowett*, [1938] 4 All E. R. 21, that dangers to pedestrians

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may come from window cleaners standing on the sills of windows to clean the outsides of them, which may amount to an offence on the part of occupiers or employers under the Town Police Clauses Act, 1847, s. 28. The more normal cases can be shortly summarised as follows. Under the Road Traffic Act, 1934, s. 2 (3), "A person prosecuted for driving a motor vehicle on a road at a speed exceeding a speed limit imposed by or under any enactment shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding that limit". In *Melhuish* v. *Morris*, [1938] 4 All E. R. 98, the Divisional Court held that the necessary corroboration was lacking where the only evidence given of excess of speed was that of two police officers, travelling in the same police car, who both stated that they based their estimates of the appellant's speed upon their observations of the one and the same speedometer, without any evidence being given as to the accuracy of that instrument. Neither officer spoke of his personal opinion of the speed. "The case for the prosecution rested only on the observation and recital of the results exhibited on the speedometer".

Speed
Corroboration.

In *Brighty* v. *Pearson*, 159 L. T. 619, the evidence was that Officer A deposed to over-speeding on one section and Officer B to over-speeding on another section of the same road; the two of them did not depose to the speed on one and the same section; neither of them relied on a speedometer or on a stop-watch, nor was there any reference to any specified and measured distance for the purpose of calculating the speed. The Court had no difficulty in holding that there was not the necessary corroboration.

Dangerous driving.

Durnell v. *Scott*, [1939] 1 All E. R. 183, emphasises that in charges of driving to the danger of the public "having regard to . . . the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road" under the Road Traffic Act, 1930, s. 11 (1), regard must clearly be paid not merely to actual, but also to potential, danger. Nothing much can be derived from the judgment of the Court of Criminal Appeal in *R.* v. *Howell*, 27 Cr. App. R. 5, save that if the jury's verdict amounts to saying, "We know, when we look at the consequences and see the results of the event, that the driving was in fact dangerous, but, so far as the driver is concerned, we impute

to him no more than a mere error of judgment", then the defendant is entitled to an acquittal on the charge under section 11.

Licence

In *East Midland Traffic Area Traffic Commissioners* v. *Tyler*, [1938] 3 All E. R. 39, the owner of a car took three friends, who were fellow-employees of his, to and from their work each day in his car. By agreement, the expenses of oil and petrol, etc., were shared between them, each of the four paying 5s. a week. The Divisional Court, whilst sympathising with the owner, felt constrained to hold that under the Road Traffic Acts he was running a public service vehicle without the appropriate licence. Less sympathy can be felt with the respondents in *Sidery* v. *Evans and Peters*, 55 T. L. R. 54, who tried to evade the Acts by making passengers join a club at the nominal fee of threepence. The case is of value for its discussion of what constitutes "an express carriage" and "a special occasion for the conveyance of a private party" under the Acts. *Dark* v. *Western Motor and Carriage Co.*, [1939] 1 All E. R. 143, is notable as an illustration of the strictness of the interpretation of the Road Vehicles (Registration and Licensing) Regulations, 1924. The user of a vehicle to tow a trailer laden with a motor-boat, which was being taken to the respondents' repair shops for repairs, was held not to be within the words "in the course of his business as a manufacturer or repairer of or dealer in mechanically propelled vehicles" so as to make the user one covered by a general trade licence. The ingenious argument was pleaded that the boat was "a mechanically propelled vehicle", but the Court thought that the repairing of such boats was only incidental to the respondents' business and was not covered by the regulations. Under the same regulations, in *Green* v. *Dynes*, 159 L. T. 168, an offence was deemed to have been committed when a garage hand took out a vehicle under a general trade licence in order to instruct a lady "learner", for which tuition she had agreed to pay his employers. At the material time she was driving the car with the employee sitting beside her. The regulations provide that a general trade licence shall not at any time be used upon a vehicle which is being used for the conveyance of passengers for profit or reward. The lady was held to be such a passenger, even though she was driving, and the employee was guilty of breach of the regulations. *Jones* v. *Meatyard*, [1939] 1 All E. R. 140, draws attention

to the fact that no mention is made of gain or advantage as an ingredient of the offence of making a false statement for the purpose of obtaining the issue of a certificate of insurance contrary to the Road Traffic Act, 1930, s. 112 (2).

Mens rea.

Special reference should be made to the judgments delivered by the Court of Justiciary in *Mitchell* v. *Morrison*, [1938] J. C. 64, to the effect that a licence holder may be guilty of the offence of failing to cause to be kept a current record of driving hours when a driver employed by him has made an incorrect entry in the current record and that it is immaterial that he has not had an opportunity of checking such an entry. *Mens rea*, said the majority of the Court, is not a necessary ingredient of this offence under the Road and Rail Traffic Act, 1933, s. 16, but three members of the Court strongly dissented. A case involving less hardship was that of *Maidment* v. *Norris*, 158 L. T. 255, where an employer had warned his driver to have his lorry weighed if he were in any doubt about the weight, and, in any case, to have it weighed at the first opportunity. The employer was convicted for breach of the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 64. As the Divisional Court pointed out, the employer had taken the risk that the lorry for part of its journey, at any rate, would exceed the permitted weight.

Habitual criminals.

Four cases draw attention to difficulties experienced in trials of charges of being habitual criminals. Humphreys, J., said in *R.* v. *Triffitt*, 26 Cr. App. R. 169, that "there is an apparent dislike on the part of tribunals to follow the procedure which has been laid down" by statute and by several decisions of the Court of Criminal Appeal. It is emphasised that the proper course, where a person charged with an indictable offence is further charged with being a habitual criminal, is for his trial as a habitual criminal to follow "immediately" on his conviction of, or plea of guilty to, the substantive offence, before sentence is passed for the substantive offence. Non-adherence to this course was deemed sufficient in this case to quash the conviction and sentence on the habitual criminal charge, though otherwise there was no merit in the appeal. Phillimore, J., suggested as far back as 1910 to the Home Office that there should be a change in the law to allow postponement of the habitual criminal charge in desirable cases, but no change has been made. The Court also stressed that proof ought to be given

at the trial of the receipt seven days before the trial of the statutory notice to the Clerk of the Court that a charge of being a habitual criminal is to be inserted in the indictment.

R. v. *Triffitt* soon required explanation in *R.* v. *Vale*, 26 Cr. App. R. 187, where the Recorder at the Old Bailey, when the prisoner pleaded guilty to the substantive offence, immediately, without passing sentence or in any way dealing further with the case, sent the prisoner to the Commissioner's Court at the same sessions to be dealt with on the charge of being a habitual criminal. The Court of Criminal Appeal held that this was a perfectly proper procedure. "Immediately" as used in *R.* v. *Triffitt* did not mean "without interval of time" (though it must mean "at the same sessions of the Court") but "without any interposition of any other dealing with the case" and "without any hearing of the prisoner's history and sentencing him for the substantive offence" between the plea, or verdict, of guilty of the substantive offence and the trial of the charge of being a habitual criminal. There seems to be room for further clarification of the position having regard to the variance in terms between judgment and judgment delivered in the past.

The Court in *R.* v. *Andrews*, 27 Cr. App. R. 12, stressed that it is highly desirable that defendants charged with being habitual criminals should be represented by counsel. An omission to tell the defendant of his right to call witnesses spelt the quashing of the conviction in this case. *R.* v. *Jones*, [1939] 1 All E. R. 181, emphasises that the burden of proof is on the Crown in these charges and that it should be discharged as completely—and more so, if that is possible—in these cases as in ordinary cases. Judges should be most careful to direct juries on this matter and, particularly, to draw their attention to any evidence that the prisoner has honestly attempted to obtain work between his last discharge from prison and his recent arrest.

Evidence. System.

Mr. D. W. Logan did not overstate his case when he said in his note on *R.* v. *Slender*, 26 Cr. App. R. 155, in the *Law Quarterly Review*, Vol. 54, p. 385, that it "seems to place too high a premium on versatility and too heavy a penalty on dullness" and that the Court should fall under the castigation by Wigmore of "Judges who set their faces firmly against every instance which is not on all fours with the offence in issue, regardless of the consideration that

justice consists quite as much in protecting the public against evil-doers as in showing mercy to those whose guilt has been more or less skilfully concealed". The appellant and D. had been convicted of having obtained money by false pretences from Miss S., the pretence being that they had come from another town, that they were obliged to spend the night in Miss S.'s town, and that they needed money for their expenses. The trial Judge admitted evidence to the effect that the same two men two days previously had visited P. in the same district and had obtained money from him by the story that they wanted to go to a neighbouring aerodrome where they had work and required money for the journey. On that occasion the appellant gave a false name. The Court of Criminal Appeal quashed the conviction on the ground that this evidence was inadmissible to prove "system". With respect, Humphreys, J.'s judgment was inadequate and it provides another illustration of the criticism that this Court should more frequently reserve its judgments for consideration. The ground relied upon was that the false pretence to P. was not the same as in the case of Miss S. "The statement made was quite different, in fact exactly opposite. In the earlier case the men said that they wanted the money because they wanted to go to some other place". Apparently, if the same pretence had been used, the evidence would have been admissible. The distinction seems to be neither sound law nor good sense.

Character.

A much sounder decision was that in *R.* v. *Cohen*, 26 Cr. App. R. 190, where the Court of Criminal Appeal quashed a conviction for conspiracy and obtaining by false pretences because the prisoner had been cross-examined with regard to a previous bankruptcy in such a way as to transgress the strict provisions of the Criminal Evidence Act, 1898, s. 1. The questions may not have tended to show that he had committed a bankruptcy offence but they did tend to show that he was of bad character. The prisoner's character had not been put in issue.

Accomplices, etc.

In *R.* v. *Oram*, 26 Cr. App. R. 213, O. and S. were jointly tried on a charge of attempting to procure the commission of an act of indecency with each other. The police evidence against the two men was identical but a statement made by S. to the police implicating O. was given in evidence. In summing up, the Judge told the jury, in dealing with the case against O., to disregard, so far as humanly possible, the

statement made by S. S. was acquitted and O. convicted. Seeing that there was no distinction between the evidence in the two cases, save the statement, the jury must have acted on that statement, which was not evidence against O. The Court quashed the conviction. *R.* v. *Firth*, 26 Cr. App. R. 148, emphasises that where a statement prejudicial to a prisoner has been inadvertently made to the jury by a witness, and counsel applies for the trial to be started afresh, the Judge ought to discharge the jury and begin the trial before a new one. A strong warning by the Judge that the jury should disregard the statement is not sufficient in such cases. *R.* v. *Lewis*, 26 Cr. App. R. 110, shows that failure to follow the rule as to giving directions as to the necessity of corroboration of an accomplice's evidence may not be fatal to conviction in all cases. But the conviction will only be permitted to stand if, and only if, there exists corroborative evidence of such a convincing, cogent and irresistible nature that the jury, if properly directed, must have come to the same conclusion.

Indictments.

R. v. *Muir*, 26 Cr. App. R. 164, directs that in an indictment for rape a count charging the prisoner with an indecent assault on another woman at another time should not be included.

Joinder.

Reference should be made here to the advice of the Judicial Committee in *Choukhani* v. *King-Emperor*, 54 T. L. R. 454, on the question of the joinder of persons accused of different offences committed in the course of the same transaction, which is permitted under the Indian Code of Criminal Procedure, s. 239 (*d*).

Amendment.

The Court of Criminal Appeal in *R.* v. *Cleghorn*, [1938] 3 All E. R. 398, drew attention to the fact that even if an amendment of an indictment does not come within the four corners of what is allowed by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2, if no application is made at the trial to quash the indictment the amendment cannot be questioned later as contrary to the provisions of the Act.

Defective procedure.

The Court in *R.* v. *Collins*, 26 Cr. App. R. 177, held that where the accused has indicated to the examining justices his intention of pleading guilty and they have bound over witnesses for the prosecution conditionally under the Criminal Justice Act, 1925, s. 13, if at the trial the prisoner in fact pleads not guilty, the Court ought not to allow the depositions

of the witnesses to be read to the jury under sub-section 8 of that section. The correct procedure is to adjourn the trial so that the witnesses (other than the purely formal ones) may be called. The mere reading of the depositions might be a procedure within the letter of the 1925 Act, but it is quite clear that the purpose of the Act was to save time and expense in cases where no possible injustice could be done to anybody; it never contemplated what, in effect, would amount to the abolition of the ordinary method of trial by a jury which has had "the inestimable advantage" of the opportunity of seeing and hearing the witnesses.

In *R.* v. *Philips*, *R.* v. *Quayle*, [1939] 1 K. B. 63, proceedings against Q. on charges of false pretences and obtaining credit by fraud were continued before the committing magistrates over a period of three months before P. was arrested and brought before them as a co-defendant with Q. During that period thirty-five witnesses had been regularly examined in the presence of Q.; their evidence incriminated P. and, therefore, it became necessary to repeat their evidence when P. was brought before the Court. Their evidence related to charges subsequently embodied in counts 1 to 7 of an indictment containing seventeen counts, of which count 8 related to Q. only. To save time, the Court took the course of not re-examining each witness in the presence of P. but of reading over his depositions to each witness and asking him if it were correct and asking him to sign it if he approved of it as correct. P. was then given an opportunity of cross-examining each witness in turn after his deposition had been read. P. was convicted on the sixteen counts which related to him and Q. was convicted on counts 9 to 17 and acquitted on counts 1 to 8. The Court of Criminal Appeal held that the procedure adopted was irregular and so contrary to law that the trial of P. on counts 1 to 7 must be regarded as a nullity and his conviction on those counts quashed. The terms of the Indictable Offences Act, 1848, s. 17, are imperative "and if they are complied with the accused person hears the witness give his evidence so that he is able to object to any question that may be put improperly and to see that the oral evidence is recorded in writing with accuracy and fairness". P. had not been prejudiced on counts 9 to 17 and the Court allowed the convictions thereon to stand. When magistrates commit on several charges the committals are several and distinct, and,

if one is bad, the others are not invalidated of necessity. Q.'s trial was unaffected by these irregularities.

Time limitations.

The argument of the appellant at quarter sessions in *Homolka* v. *Osmond*, [1939] 1 All E. R. 154, was that she had been convicted for aiding and abetting another in committing the offence of driving a car whilst disqualified to hold a licence; that aiding and abetting that misdemeanour is only an offence under the Summary Jurisdiction Act, 1848, s. 5; that, therefore, as the summons had been issued against her more than six months after the alleged offence, the magistrates had no power to try it because it was out of time under section 11 of that Act. Quarter sessions allowed the appeal, but on a case stated the Divisional Court said that it was "too clear for argument" that the sessions had taken a wrong view of the law. Section 5 only deals with procedure and punishment; it does not create an offence. An accessory before the fact to the commission of a misdemeanour is to be regarded in law, for the purposes of conviction, as a principal offender. The rule applicable to a principal in the offence under the Road Traffic Act, 1930, s. 7, which was in question here, is that the summons is in time if issued either (*a*) within six months of the date of the alleged offence, or (*b*) within one year of that date (but within three months of the date on which the alleged offence came to the knowledge of the prosecutor), whichever period is longer. That limitation was equally applicable to aiders and abettors.

Jurisdiction.

In *Pratt* v. *A. A. Sites, Ltd.*, [1938] 2 K. B. 459, the trial justices decided that they had no jurisdiction to hear the complaints preferred by the appellants against the respondents. They then stated a case for the opinion of the Divisional Court whether they had rightly decided thus in point of law. The Court held that the justices, in the circumstances, had no power to state a case under the Summary Jurisdiction Acts, for they had not heard and determined the complaints but merely refused jurisdiction. The remedy of the appellants was to follow the course properly open to them—and it was not to get a case stated.

The advice of the Judicial Committee in *Chung Chi Cheung* v. *R.*, [1938] 4 All E. R. 786, falls more properly for discussion under the heading of International Law. The appellant, a British subject, had been convicted of murder by the Hong Kong Supreme Court; the offence had been

committed on a vessel in the service of the Chinese Government whilst it was in the Hong Kong territorial waters. Lord Atkin, in delivering the advice of the Court, accepted the view that the ship was not to be treated as territory of the Chinese Government. "The domestic Courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional, and can, in any case, be waived by the nation to which the public ship belongs". In a most interesting speech, Lord Atkin discussed the question of the immunities attaching to a ship of war. Applying his views to the facts of this case, his Lordship remarked that a diplomatic request for the surrender of the appellant to the Chinese Government would have been in order. But such a request was not made; the machinery used was a request for extradition, which inevitably failed upon the relevant treaty and statutory rights. Once these proceedings were out of the way, it appeared to the Board that the Chinese Government consented to the British Court exercising jurisdiction. In view of this waiver of immunity, the Hong Kong Court had jurisdiction.

Autrefois convict.

In *R.* v. *Lester*, 27 Cr. App. R. 8, the appellant was charged on an indictment containing counts for larceny and receiving. Considering that the evidence pointed to larceny rather than to receiving, the Judge directed the jury on the larceny issue only. The jury, however, returned a verdict of "not guilty" of larceny, but "guilty" of receiving. Thereupon, the Judge took the curious course of accepting the verdict on the first count but refusing the verdict on the second count, on the ground that he had not directed them on that head. He ordered the appellant to be properly tried on the receiving charge at the following sessions. At those sessions, the appellant appeared before another Judge and a plea of *autrefois convict* filed on his behalf succeeded. But the Judge this time did not forthwith discharge the appellant; taking the view that the appellant had not been sentenced at the preceding sessions on the conviction of receiving, he proceeded to sentence him himself. On appeal, the Crown did not seek to support the conviction. The Court of Criminal Appeal held that "anything more contrary to law

it would be more difficult to imagine" than the course taken at the first trial. The Judge had no right to refuse to accept the verdict of the jury, which was in fact and in law a verdict which the jury could properly return on the indictment and on the evidence. Nor did the Judge have the power "to do what no one in this country has power to do, namely, to direct that there should be a new trial". The "Comedy of Errors", as Humphreys, J., called it, then moved to its last act, when the second Judge failed to discharge the appellant at once on the finding of *autrefois convict*, which was his duty. The Court held that the conviction of receiving could not stand. It is an offence which requires a most careful direction to the jury; in this case there had been no direction at all.

Autrefois convict.

R. v. *Briggs*, [1938] 1 All E. R. 529, deserves mention because the facts were distinguished from those in *R.* v. *Sheridan*, [1937] 1 K. B. 223, and *R.* v. *Grant*, 52 T. L. R. 676, discussed at length in the *Annual Survey*, 1936. The prisoner here was at no time asked whether or not he consented to be tried summarily, but he pleaded guilty under the impression, as he alleged on appeal, that he was to be dealt with there and then. Upon his plea, he was at once committed for trial at the assizes. The Court of Criminal Appeal held that the two earlier cases did not apply to such a case as this and that the plea of *autrefois convict* could not be maintained.

LITERATURE

New Works

The Law affecting Police and Public. By Gerald Abrahams. London: Sweet & Maxwell, Ltd. xviii and 215 pp. 15s.

In this short work, which the author calls "an essay", he has endeavoured to describe generally, with a sufficient juristic and sociological background to be expected of a sometime lecturer in law and in social philosophy, the concepts lying behind the term "law and order"; he has described the general powers and the position in law of the police, the meaning of "the liberty of the subject", particularly in relation to powers of arrest, what the man

literally "in the street" can or can not do, what the Englishman, and the police, can or can not do in "the Englishman's castle"; and he ends his review with a chapter on "The Evidence for the Prosecution". It is a good, short, general review of a complicated subject.

Powers of the Police as to Arrest, Entry, Search, Seizure and other Cognate Matters. By the Hon. Dougall Meston and H. E. Piffe-Phelps. London: Sweet & Maxwell, Ltd. iv and 184 pp. 12s. 6d.

This is a catalogue of the powers specified in the title.

The Justices' Formulist and Handbook to the Statutory Rules, Orders and Forms relating to Magisterial Practice. With annotations. By Cecil Geeson. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. xiv and 344 pp. 15s.

This is a useful handbook setting out the Summary Jurisdiction Rules, 1915—1935, the schedule of forms in summary proceedings, forms under the Probation of Offenders Act, forms for civil debt, and the forms for the Court register and accounts. Under the heading of indictable offences, it gives the rules and orders of 1926, with the schedule of forms. Other rules and regulations set out are those relating to costs in criminal cases, with forms, to witnesses' allowances, Court fees, legal aid and defence, probation and children and young persons, adoption, moneylenders, employers and workmen, and appeals. A very useful part is that setting forth recent Home Office circulars and memoranda on various matters, which fill nearly 100 pages of the work.

English Juvenile Courts. By Winifred A. Elkin. London: Kegan Paul. viii and 316 pp. 12s. 6d.

This is a good general survey of the causes and nature of juvenile delinquency, the nature and the jurisdiction of the Courts and their organisation, the methods of approach and treatment, with special reference to probation, followed by a review of the success of the Courts. The book is based on a considerable amount of "field work" and deserves careful perusal by anyone interested in the reforms recently proposed by the Home Secretary.

The Law as to Children and Young Persons. By Thomas Trotter. London: Hodge & Co. xlix and 420 pp. 42s.

Although this comprehensive work primarily deals with the law in Scotland, it will be found very useful by English lawyers. It deserves mention were it only for the fact that it is the first text-book to appear on the subject in Scotland—a notable fact when one recalls the plethora of works on the subject published in England.

The Police Idea. Its History and Evolution in England in the Eighteenth Century and After. By Charles Reith. Oxford University Press. x and 261 pp. 8s. 6d.

New Scotland Yard. By George Dilnot. London: Nelson & Sons. vii and 136 pp. 2s. 6d.

Justice in England. By a Barrister. London: Gollancz, Ltd. 288 pp. 7s. 6d.

The first of these works is a well annotated review of the history of the growth of the police which starts very well and then rather "peters out". It will be found very useful for the period up to 1829. It does justice to James Mackintosh, whose name still awaits the honourable place in the annals of English criminal law reform which it deserves. The second work is a short and very "popular" account of the work of the London police. The third is yet another of the somewhat numerous works of this nature which have appeared in recent years, which moves to its pre-destined climax—"The lesson of course is that only in a Socialist state can there be justice". Apart from its politics, it contains a considerable amount of useful information, particularly on legal aid for the poor on criminal charges.

Suicide. A Social and Historical Study. By H. Romilly Fedden. London: Peter Davies. 351 pp. 12s. 6d.

This is a very interesting general study of the topic of suicide, and the social reaction to it, throughout the ages, replete with classical, literary, and historical allusions. It contains a good bibliography.

New Editions

Archbold's Criminal Pleading, Evidence and Practice. Thirtieth edition. By R. E. Ross and Maxwell Turner.

London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. cxvi and 1684 pp. 52s. 6d.

It would be superfluous to dilate on the excellence of this work. Mr. Turner is to be congratulated on his succession to the joint editorship in place of Mr. T. R. F. Butler and thus to occupy a place filled a century ago by Sir John Jervis. Between the Betting and Lotteries Act, 1934, the Counterfeit Currency Act, 1935, the Coinage Offences Act, 1936, and the Firearms Act, 1937, the editors had quite a considerable amount of work to do, but they have incorporated these statutes and the new case law with great success without adding more than about ten pages to the work.

Hayward and Wright's Office of Magistrate. Sixth edition. By E. J. Hayward. London: Butterworth & Co. xvi, 231 and 32 pp. 10s. 6d.

The last edition of this work was published as long ago as 1922 (previously it was edited by Mr. Mead, the Metropolitan magistrate), so that Mr. Hayward had a great deal of new material to incorporate. This he has done very successfully without unduly extending a work which must be kept fairly brief.

Gregg's Police Constable's Guide to his Daily Work. Eighth edition. By C. P. Brutton and G. Campbell Vaughan. London: Pitman & Sons. xiii and 728 pp. 6s.

This is a carefully prepared edition of about the best work of its kind published in this country; it is wonderful value for the price. Its catalogue of "Offences and Action to be taken thereon" is a very complete one and would be found useful by many classes of persons besides the police.

Articles

The output of articles was comparatively meagre this year.

Reference has been made in the text to Dr. C. K. Allen's article on False Pretences and to Professor Paton's discussion of the topic of *mens rea* in Bigamy.

R. v. *Bourne*, discussed in the text, formed the occasion for Mr. D. V. Glass's review of "The Effectiveness of Abortion Legislation in Six Countries" in the *Modern Law*

Review, Vol. 2, pp. 97, 227, and for Mr. Seaborne Davies's article on "The Law of Abortion and Necessity" in the same volume, p. 126. There, too, at p. 54, may be found Dr. Hermann Mannheim's review of the Report of the Departmental Committee on Corporal Punishment (1938, Cmd. 5684), which has loomed large in the discussions on Sir Samuel Hoare's new reform Bill.

With Mr. E. C. S. Wade's article in the *Modern Law Review*, Vol. 2, p. 177, on "The Law of Public Meeting" may be mentioned the long anonymous note in the *Yale Law Journal*, Vol. 47, p. 404, on a comparative study of "Public Order and the Right of Assembly in England and the United States". In the same direction is Professor Karl Lowenstein's article in the *Columbia Law Review*, Vol. 38, pp. 591 and 725, on "Legislative Control of Political Extremism in European Democracies". A valuable legal and sociological study of "Government Regulation of Trade Unions in Great Britain" is the work of Mr. H. V. Rothschild in the same volume, pp. 1, 1385. In the *Canadian Bar Review*, Vol. 16, p. 278, Mr. E. S. MacLatchy discusses "Contempt of Court by Newspapers in England and Canada". In the same volume, p. 202, Mr. R. A. Ritchie discusses "The Crime of Conspiracy". The only article of note on criminal law in the *Harvard Law Review* (Vol. 52, p. 40) was the historical and comparative study by Mr. Leo Alpert of "Judicial Censorship of Obscene Literature". In view of the *Andrews Case*, attention should be drawn to the excellent article by Professor J. J. Robinson on "Manslaughter by Motorists" in the *Minnesota Law Review*, Vol. 22, p. 755.

Dr. Jackson's article in the *Cambridge Law Journal*, Vol. 6, p. 367, on "Jury Trial To-day" deals mainly, but not exclusively, with civil cases. Mr. N. T. Eliff's "Notes on the Abolition of the English Grand Jury" in the *Journal of Criminal Law and Criminology*, Vol. 29, p. 3, contains a great deal of useful historical material. In the same volume (p. 555) Professor Hans von Hentig deals shortly, but effectively, with "The Limits of Deterrence"—"a principle that should be handled with the utmost prudence". Dr. Hermann Mannheim's comparative study, "The Treatment of Mental Disorders and Mental Deficiency in Continental

Criminal Law", is a valuable review found in the *Journal of Mental Science*, May—July, 1938. Lord Normand gives an excellent account of "The Public Prosecutor in Scotland" in the *Law Quarterly Review*, Vol. 54, p. 345. A large number of other articles of less direct interest may be found in the *Journal of Criminal Law and Criminology* and in the *Journal of Criminal Law*, and in the weekly English legal journals.

EVIDENCE AND PROCEDURE

LEGISLATION

The appointment of a "purely legal" Lord Chancellor has resulted in some important legislation in this field. The *Administration of Justice (Miscellaneous Provisions) Act*, 1938, takes a mild step towards the correction of some of the weaknesses of the system of unpaid and unqualified magistracy by providing that the Court of Quarter Sessions for any county, or of any division or part of a county (not being the Court of a recorder of a borough), may apply to the Lord Chancellor for the appointment of a legally qualified chairman or deputy chairman (section 1 (1)). The person so appointed must be or have been a barrister or solicitor of not less than ten years' standing, having such legal experience as to qualify him, in the opinion of the Lord Chancellor, for the post. Tenure of office depends upon the terms of the appointment and the holder becomes *ex officio* a justice of the peace. Section 2 (1) extends the jurisdiction of quarter sessions when presided over by a "legally qualified" chairman to the offences set out in the First Schedule to the Act (*q.v.*). For the purposes of that section, the expression "legally qualified" chairman includes a chairman or deputy chairman appointed under the Act and a chairman who holds or has held certain important judicial and legal offices which are specified in section 2 (3). Even if the legally qualified chairman is not present the wider jurisdiction may be exercised if the Court is presided over by a deputy appointed by him and who has held one of the offices specified in section 2 (3). If the Court of Quarter Sessions and the county council so agree the council may pay a salary to a chairman or deputy chairman appointed under the Act (section 4). Section 3 confers upon quarter sessions the power to adjourn quarter sessions generally. The power to cancel assizes at any place on the circuit where there is no substantial business to be dealt with is now exercisable by the Judge or senior Judge going the circuit (section 5). Section 6 contains provisions which will relieve the pressure of criminal business at assizes.

1 & 2 Geo. 6, c. 63.

Section 7 substitutes orders of mandamus, prohibition, and certiorari for the prerogative writs of those names. No return

may be made to any such order and no pleadings in prohibition are allowed. The order is final subject, however, to any right of appeal therefrom. Any mandatory powers exercisable by the High Court by virtue of any enactment are exercisable henceforth by an order of mandamus (section 8). This includes the power to order justices to state a case for the opinion of a Divisional Court (*ib.*). Section 9 abolishes informations in the nature of *quo warranto*; the jurisdiction is henceforth exercisable by the issue of an injunction and if the case so warrants an office may be declared vacant. No application for an order of mandamus, certiorari or prohibition may be made without leave (*Rules of the Supreme Court* (*Divisional Courts*), 1938, r. 3). Application for leave must be made to a Divisional Court of the King's Bench Division or, in vacation, to a Judge in chambers. Application for the order is by notice of motion to a Divisional Court or by summons to a Judge in chambers during vacation. Application for leave or for an order of certiorari to remove proceedings from a Court of inferior civil jurisdiction, or in case of prohibition to such Court, may, however, at all times be made to a Judge in chambers (rule 10). Any person is entitled to be heard against the application even though not served, if the Judge considers him a proper person to be heard (rule 7).

1938, No. 1577/L.30.

Procedure under section 9 of the Act is the same in most respects as in applications for an order of mandamus (rule 11).

Section 11, which modifies the jurisdiction of the King's Bench Division in respect to the trial of indictments, is discussed in the Section on Criminal Law (*supra*). Section 12 abolishes outlawry proceedings, the exhibiting of articles of the peace in the High Court, and criminal informations other than informations filed *ex officio* by His Majesty's Attorney-General.

Section 13 deals with international conventions affecting the jurisdiction of English Courts, and is discussed in the Section on Conflict of Laws (*infra*).

By section 15 all appeals from proceedings in the Mayor's and City of London Court lie to the Court of Appeal in the like circumstances in all respects as if the cause or proceedings had been in a county court, except where, in accordance with the Mayor's and City of London Court Act, 1920, s. 8, the procedure of the Supreme Court has been adopted, when the

appeal lies in all respects as if the proceedings had been in the High Court.

Section 16 makes an important extension of the jurisdiction of county courts. The limit of £100 imposed by the County Courts Act, 1934, ss. 40 and 41, in actions of contract, tort, or for money recoverable by statute is raised to £200. Where the claim is for more than £100, if the defendant gives notice that he objects to the action being tried in the county court the Judge must order the action to be transferred to the High Court. The power of the High Court to transfer equity proceedings to a county court may now be exercised without application (section 17).

Section 18 also extends the jurisdiction of county court Registrars. The section authorises the making of rules under County Courts Act, 1934, s. 99, authorising the Registrar to hear and determine proceedings other than actions, and any actions in which the defendant fails to appear at the hearing and admits the claim, and, by leave of the Judge, any action in which the sum claimed or amount involved does not exceed £10.

The *Leasehold Property (Repairs) Act*, 1938, is incorporated in the County Courts Act, 1934, s. 52 (3) and Sched. II, so that all proceedings under the Act with some exceptions are within the jurisdiction of the county court. 1 & 2 Geo. 6, c. 34.

The *Evidence Act*, 1938, makes far-reaching changes in the law of evidence and shakes the administration of justice free from an inconvenient application of the hearsay rule. The measure is a *ballon d'essai* at reform of the law of evidence and if it proves successful will, according to Lord Maugham, be followed by further statutory amendments of the law. 1 & 2 Geo. 6, c. 28.

In any civil proceedings where direct oral evidence of a fact would be admissible any statement made by a person in a document tending to establish that fact may be given in evidence, provided certain conditions are satisfied. The maker of the statement must either have personal knowledge of the matters dealt with by the statement or, where the statement forms part of a continuous record, have made it in the performance of a duty to record information supplied to him by a person who had or might reasonably be supposed to have personal knowledge of the matter recorded. The maker of the statement must be called as a witness unless he is dead or unfit to attend as a witness, or is beyond the S. 1. S. 1 (1) (i) (*a*) and (*b*). S. 1 (1) (ii).

seas and it is not reasonably practicable to secure his attendance, or if all reasonable attempts to find him have been
S. 1 (2) (*a*). made without success. The Court may admit the statement, moreover, even though the maker is available but is not called, if it is satisfied that undue delay and expense would
S. 1 (2) (*b*). otherwise be caused. On similar considerations the Court may admit a copy of the statement certified in such manner as the Court may think fit. The statement must, however,
S. 1 (4). be made *ante litem motam*. The document is not deemed to be made by a person unless the material part was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognised by him in writing
S. 1 (5). as one for the accuracy of which he was responsible. Notwithstanding that the conditions of section 1 are satisfied the Court, if the proceedings are with a jury, may in its discretion reject the statement if for any reason it is inexpedient to
S. 2 (1). admit it. The question whether the document was made contemporaneously with the occurrence or the existence of the facts recited in it or whether the writer had any interest to misrepresent the facts is material in estimating the weight
S. 2 (2). of the evidence. The statement is not corroboration of any evidence given by the writer for the purposes of any rule of law or practice requiring corroboration.

S. 3. By virtue of section 3 it is no longer necessary to call an attesting witness to prove a document which is required by law to be attested; such a document may be proved in the same way as if no attesting witness were alive. Wills and other testamentary documents are expressly excluded
S. 4. from this provision. The old rule that private documents thirty years old, produced from proper custody, "proved themselves" is amended by reducing the period to twenty years.

S. 5. Section 5 clears up a doubt as to the powers of the Rule Committee of the Supreme Court and of the County Courts Rule Committee under section 99 of the Supreme Court of Judicature Act, 1925, and section 99 of the County Courts Act, 1934, respectively. It is declared that those sections authorise the making of orders that particular facts be proved by affidavit with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination. Doubts as to the validity of the new Order XXX, r. 2 (3), replacing the proviso to the old Order XXXVII, r. 1, are thus dispelled.

Considerations of space preclude an adequate discussion of the new Act, and the reader is referred to the full account given by Messrs. Burrows and Cahn, *The Evidence Act, 1938*, which is reviewed below. Nevertheless one or two points may be briefly mentioned here. In the first place it should be noted that documents may be admissible under section 1 even though under the old law they could not have been used by a witness to "refresh his memory", either because they were not made contemporaneously with the events recorded or because the witness had no personal knowledge of the matters dealt with in the statement. In this latter respect private documents are put on much the same footing as public documents and registers. At the same time a witness may refresh his memory from documents which he has not made himself, if they were made in his presence or checked by him when the facts were fresh in his mind and he knew the statements to be correct. Documents are not admissible, however, under the Act unless there is some written evidence that the document was made by the person by whom it is alleged to have been made or that he is responsible for the accuracy of it.

Sub-section 5 of section 1 is of particular interest in drawing a distinction between trial by Judge and jury and trial by Judge alone. In the former case the Judge may exclude a document which would otherwise be admissible if he deems it inexpedient that the document should be admitted. One general comment may be offered and that is the important part that will be played in the working of the Act by the Judge's discretion. A wide discretion in matters of evidence is very desirable, provided it does not result in a plethora of case law defining the conditions in which the discretion should be exercised. The Act obviates this danger to some extent by indicating the proper grounds for exercising discretion.

A number of Acts of Parliament contain incidental provisions affecting the law of evidence. Thus the *Inheritance (Family Provision) Act*, 1938, s. 1 (7), provides that a statement in writing signed by the testator as to his reasons for making the dispositions contained in his will shall be admissible in proceedings under the Act. The weight of such evidence is to be determined with regard to all the circumstances from which any inference as to its accuracy can reasonably be drawn. 1 & 2 Geo. 6, c. 45, s. 1 (7).

1 & 2 Geo. 6, c. 52, Sch. III, 12 (3).

The *Coal Act*, 1938, Sched. III, para. 12 (3), is interesting. It limits the number of expert witnesses that may be called by a claimant or Regional Valuation Board to one, unless the referee otherwise directs.

1 & 2 Geo. 6, c. 56.
1 & 2 Geo. 6, c. 71.
1 & 2 Geo. 6, c. 17.
1 & 2 Geo. 6, c. 56.
1 & 2 Geo. 6, c. 35.
1 & 2 Geo. 6, c. 44.
1 & 2 Geo. 6, c. 22.

New statutory presumptions are created by the following provisions: *Food and Drugs Act*, 1938, ss. 3 (2), 7, 23 (1), 38 (6); *Bacon Industry Act*, 1938, s. 19 (2) (*b*). The methods of proof of certain facts are specified in the following Acts: *Bacon Industry Act*, 1938, Sched. I, para. 17; *Coal Act*, 1938, Sched. I, para. 13; *Cinematograph Films Act*, 1938, ss. 32, 37 (2), (4) and (6); *Food and Drugs Act*, 1938, Sched. III, para. (5), ss. 81, 42 (5) and (7); *Housing (Rural Workers) Amendment Act*, 1938, s. 11 (5); *Road Haulage Wages Act*, 1938, s. 8 (1); *Trade Marks Act*, 1938, ss. 46, 55—58.

1 & 2 Geo. 6, c. 37.
1 & 2 Geo. 6, c. 30.

Powers to take evidence on oath are conferred by the *Coal Act*, 1938, Sched. VII, para. 3; *Street Playgrounds Act*, 1938, s. 3; *Sea Fish Industry Act*, 1938 (Minister of Agriculture may order that the Tribunals of Inquiry (Evidence) Act, 1921, shall apply to the White Fish Commission).

Statutory Rules and Orders

1938, No. 1577/L.30.

The *Rules of the Supreme Court (Divisional Courts)*, 1938, have already been noticed above. The new Rules revoke the Crown Office Rules, 1906 (S. R. & O., 1906, No. 512), p. 605. Rule 2 substitutes a new Order for R. S. C., Order LIX, dealing with the proceedings to be heard in Divisional Courts, and with the procedure therein. The new Order contains forty-seven rules and their detailed character precludes enunciation and description here. The general effect is to simplify and shorten proceedings. Thus no order *nisi*, rule *nisi*, or summons to show cause is to be made or issued in any proceeding to which the Order relates (rule 2), even the writ of *habeas corpus* coming within this general rule. Proceedings for attachment for contempt of Court in an important number of cases (as to which see the new Order LIX, r. 26 (2)) are now to be heard in Divisional Courts (*ibid.*, rule 1 (*d*)) and the procedure is assimilated to that on an application for an order of mandamus (*ibid.*, rule 26 (1)). The Rules also make a number of consequential amendments to the Rules of the Supreme Court, 1883, and specify (see Appendix to the Rules) a number of new forms to be added to the Appendices thereto.

The following Statutory Rules and Orders should also be noted :—

Rules of the Supreme Court (*No. 1*), 1938, which make amendments to Order LVD consequent on the passage of the Cinematograph Films Act, 1938; 1938, No. 732/L.18.

Rules of the Supreme Court (*No. 2*), 1938, which make detailed amendments to Order XVI, r. 30 (3), Order XXXII, rr. 2 (1) and (4), 17 (1), Order XXX, r. 2, Order XXXVI, r. 1A (3), Order LIIIA, Order LIV, Order LVB, Order LVIII, App. L : Forms 2 and 3; 1938, No. 1575/L.28.

Rules of the Supreme Court (*Criminal Proceedings*), 1938; 1938, No. 1576/L.29.

Supreme Court Fees (*Amendment*) *Order*, 1938; 1938, No. 1574/L.27.

Crown Office Fees (*Warrants and Letters Patent, etc.*) *Order*, 1938; 1938, No. 1222/L.22.

County Court Rules, 1938, *Nos.* 1, 2, *and* 3, which effect a large number of changes in the County Court Rules, 1936. The Rules specify a number of new forms, in particular forms of application and judgment under the Hire-Purchase Act, 1938; 1938, Nos. 18/L.1, 731/L.17, 1475/L.24.

County Court Fees (*Amendment No. 2*) *Order*, 1938; 1938, No. 710/L.16.

The *District Probate Registries Order*, 1938, which substitutes a new scheme for the establishment of District Probate Registries for that contained in the Judicature Act, 1925, Sched. II; 1938, No. 757/L.19.

Forms for use in District Registries (summons for directions pursuant to Order XXX); 1938, No. 296/L.5.

Do. (notice to admit documents); 1938, No. 1600/L.31.

Matrimonial Causes (*District Registries*) *Order*; 1938, No. 651/L.14.

The *Hire Purchase* (*Inferior Courts*) *Order*, 1938; 1938, No. 1563/L.25.

Chancery of Lancaster Rules, 1938, *Nos.* 1 *and* 2; 1938, Nos. 501/L.9, 1396/L.23.

Order as to Court Fees and Solicitors' Remuneration (*Lancaster Court of Chancery*), 1938.

The Master of the Rolls has issued a Practice Direction as to dismissal of appeals by consent, superseding the Direction of March 25, 1915: [1938] W. N. 89. 1938, No. 502/L.10.

Dismissal of appeal by consent.

Where an appellant is *sui juris* and does not desire to prosecute an appeal he may present a request signed by his solicitor (or by himself if he has no solicitor on the record) stating that he is *sui juris* and asking to have the appeal dismissed. Subject to the request being initialed by the President of the Court, the appeal will then be dismissed and struck out of the list, and an order for costs against the

appellant will be drawn up, costs to be taxed if the parties differ. If the appellant desires dismissal without costs his request must be accompanied by a consent signed by the respondent's solicitors, stating that the respondent is *sui juris* and consents. All other applications as to the dismissal of an appeal and all applications for an order by consent varying or reversing the order under appeal will be placed in the list and dealt with in court.

The Administration of Justice (Appeals) Act, 1934, provided that no appeal should be made to the House of Lords from a judgment or order of the Court of Appeal except with the leave of the Court or the House of Lords. It is now directed by a Practice Note, [1938] W. N. 189, that the application to the Court of Appeal is to be on notice to the other side, who will be entitled in any case to be heard against the application. Where leave is granted the order will also grant leave to the other parties to present cross appeals.

Privy Council: appeal *in forma pauperis*.

The attention of counsel is drawn to the observations of Lord Atkin on the duty of counsel who certify a petition for special leave to appeal *in forma pauperis* in a criminal case to the Judicial Committee of the Privy Council. They ought not to issue a certificate unless they are satisfied that there is some way in which they can reasonably bring the case within the rules of criminal jurisdiction which are applied by the Board. The ground on which counsel has certified the petition should be stated in the certificate: [1938] W. N., p. 339.

During the year under review Practice Notes have also been issued dealing with the following matters:—

Terms of settlement of a probate action, W. N., p. 222; application for the renewal of an unexecuted order for commitment, *ibid.*, p. 249; issue of passports to children who are the subject of an order for custody, *ibid.*, p. 186.

CASE LAW

Evidence

Estoppel by representation.

In *Mercantile Bank of India* v. *Central Bank of India*, [1938] A. C. 287, Lord Wright discussed at length the nature of estoppel. In this case the appellants sought to set up

an estoppel by representation or conduct the effect of which would have been to enable them to claim a right of property which they did not in fact possess. Goods were pledged by merchants to the respondents by delivery of a railway receipt for the goods. The respondents handed the receipt back to the merchants so that the latter might unload the goods and deliver them to the respondents' warehouse. The merchants fraudulently pledged the goods with the appellants. In an action by the respondents against the appellants it was contended that the respondents were estopped from contesting the appellants' title. The Privy Council held that there could be no question of agency in this case, nor was there any duty owed to the appellants in the matter. The necessity of a duty to constitute an estoppel is not confined to an estoppel based on conduct or negligence alone but applies equally to an estoppel by representation. Moreover, in the instant case, there was in the opinion of the Board no ground for finding a representation. In the few cases of actions for conversion in which a plea of estoppel by representation has succeeded there has been a holding-out of the holder of goods as having authority to deal with them. The mere possession of a railway receipt could not be held to convey a representation that the merchants were entitled to dispose of the property any more than the actual possession of the goods would have done. It is clear from this case that the case of *Commonwealth Trust* v. *Akotey*, [1926] A. C. 670, can be advantageously consigned to oblivion and that the remarks of Ashhurst, J., in *Lickbarrow* v. *Mason*, 2 Term Rep. 63, 70, should be interpreted with caution.

Estoppel by record.

The Courts are more conservative in their approach to the formal estoppel by deed than to estoppels by representation or conduct. The House of Lords in *Greer* v. *Kettle*, [1938] A. C. 156, has approved the rule laid down by Patteson, J., in *Stroughill* v. *Buck*, 14 Q. B. 781, 787, that "when a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party". The intention is a matter of construction of the instrument. Lord Maugham pointed out yet another limitation. The position in equity differs from the common law rule. In equity where there are proper grounds for rectifying a deed, *e.g.*, because it is based upon a common mistake of

fact, then to the extent of the rectification there can be no estoppel based on the original form of the instrument. Nor could a party set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission or in reliance on an untrue statement or recital induced by his own misrepresentation, whether innocent or otherwise. Since the Judicature Act, 1873, the rule in equity must prevail. "In all those cases where the party against whom an estoppel by deed is sought to be raised has a right to rectification which would, so to speak, destroy the estoppel, or a right to rescission on equitable grounds, he has an answer to the estoppel which would not have been open to him at common law" (at p. 172).

Presumption of marriage.

Strong and weighty evidence was forthcoming in *Re Bradshaw*, [1938] 4 All E. R. 143, to rebut the presumption of marriage arising upon proof of cohabitation of a man and woman as husband and wife, with the reputation that they were married, and supported by declarations of the parties that they were married. Bennett, J., held that the presumption was rebutted by proof of a later marriage, the parties being described in the marriage certificate as bachelor and spinster and having been so described publicly on three occasions when the banns were called. Two other cases dealing with presumption of marriage are discussed in the Section on Family Law, *viz.*, *Maturin* v. *Att.-Gen.*, and *Bowen* v. *Norman* (*supra*, pp. 96, 97).

Rule in *Russell* v. *Russell*.

The rule in *Russell* v. *Russell*, [1924] A. C. 687, has been frequently before the Courts in recent years. In *Roast* v. *Roast*, [1938] P. 8, the President again had occasion to explain the operation and limits of the rule. In this case a wife had made a statement which threw doubts on the paternity of a child born in wedlock and suggested that someone other than her husband might be its father. The question was whether that statement was admissible as an admission by the wife of having had adulterous intercourse which would justify her husband in leaving her, or whether the statement was excluded by the rule in *Russell* v. *Russell*. The Court had little hesitation in admitting the statement on the reasoning of Swift, J., in the often-followed case of *Warren* v. *Warren*, [1925] P. 107. The headnote in that case, which was read and approved by the President, puts the matter thus: "A wife's admission that she had committed adultery, even if accompanied by a statement of her belief

that a child subsequently born was the result of the adultery, cannot bastardise the child without evidence of the non-access of the husband." The admission is therefore admissible as evidence in a suit for divorce or, as in this case, to establish justification for an alleged desertion.

Corroboration : Road Traffic Act, 1934, s. 2 (3).

Two cases throw further light on the evidentiary requirements of the Road Traffic Act, 1934, s. 2 (3). That sub-section provides that a person shall not be convicted of driving in excess of a speed limit solely on the evidence of one witness to the effect that, in the opinion of the witness, the person prosecuted was driving the vehicle at a speed exceeding the limit. In *Brighty* v. *Pearson*, [1938] 4 All E. R. 127, evidence was given by two policemen who deposed as to the speed of the vehicle at different places on the same road and at different times. Neither officer had relied on a speedometer or stop-watch, nor had they, for purposes of calculation, marked out any measured and specified distance on the road. On these facts a Divisional Court allowed an appeal from conviction by the justices. The evidence of one officer did not corroborate that of the other since "at no moment . . . was there observation of the same vehicle at the same moment by the two police officers". In *Melhuish* v. *Morris*, [1938] 4 All E. R. 98, the only evidence given in support of the charge was that of two police officers travelling in the same police car who stated that the appellant had been driving at a speed exceeding thirty miles per hour, basing these statements solely on the observation of a speedometer. A Divisional Court, by a majority, allowed an appeal against conviction by the justices. Neither witness had spoken of his personal opinion or of his personal experience of such matters. Their evidence rested solely on observation of a mechanical device as to the accuracy of which no evidence had been given.

Evidence of commercial usage.

The case of *Reardon Smith Line, Ltd.* v. *Black Sea and Baltic General Insurance Co.*, [1938] 2 K. B. 730, produced an interesting discussion of the question as to how far evidence of commercial usage, not amounting to a trade custom in the strict sense, is admissible to vary the express terms of a charterparty. In the opinion of Slesser and Clauson, L.JJ., the charterparty, on a proper construction, provided for a direct route between specified termini. The contract so construed was unambiguous and therefore no evidence of the plaintiffs' own practice or of 25 per cent. of

the vessels engaged in the trade was admissible to show what was the true intention of the parties. Greer, L.J., came to a different conclusion and supported the decision of Goddard, J., in the Court below. The learned Lord Justice was satisfied that when all the circumstances were taken into account there was a recognised alternative route and that there was no deviation by a ship following that route in preference to the direct route between the termini. Lord Justice Greer's judgment is largely concerned with the construction of the charterparty, and it is here that the evidence point was crucial. He seems to have concurred in the opinion of Lord Warrington in *Frenkel* v. *MacAndrews*, [1929] A. C. 545, that, although there might be no ambiguity in the words themselves, there was a latent ambiguity arising out of the circumstance of the existence of an alternative route, and this ambiguity was a matter to be determined by evidence as to what the parties really meant.

It is notable that the two commercial lawyers who handled the case both came to a conclusion which is the more reasonable from a business point of view. It seems difficult, with respect, to accept the arguments of Slesser and Clauson, L.JJ., for excluding the evidence, since they seem to have overlooked, or under-estimated, the latent ambiguity that arose when the contract was applied to the facts. Leave was given to appeal to the House of Lords, and it is to be hoped that that Court will have an opportunity of restating the relevant principles of the law of evidence, and of giving a conclusive ruling on the confused doctrine of deviation. (This case is more fully discussed on the latter point in the Section on Mercantile Law.)

Communications between spouses: privilege claimed by widow.

Shenton v. *Tyler*, [1938] 4 All E. R. 401, is a case of more than usual interest as the Court relied on a rule of evidence to defeat an attempt to set up an alleged secret trust. The plaintiff sought in this action to administer interrogatories to the defendant in order to establish that the defendant's deceased husband had created a secret trust in the plaintiff's favour. The defendant claimed that at common law she was not compellable to disclose communications made to her by her husband during the subsistence of the marriage, notwithstanding that her husband was now dead. It was said in answer to this contention that the Evidence Amendment Act, 1853, now constitutes a complete code of the law respecting marital communications, and that by virtue of section 3 the

evidence of a widow as to communications between herself and her late husband is admissible. Simonds, J., rejected this argument; in his view section 3 must be read in conjunction with sections 1 and 2 of the Act, which make husbands and wives of the parties competent witnesses in civil cases; the evidence which they may give is then limited by section 3 in accordance with the general law. It does not seem to have been argued that the principles underlying the enforcement of secret trusts are wide enough to take the case outside the rule of evidence (even if the rule be as it was stated to be, which may be doubted) in the same way as they are admitted to take the case outside the Wills Act, 1837. Should a person, on general equitable principles, be allowed to set up a rule of evidence in a fraudulent manner to his own profit? The case suggests that a Court of equity is more tender to a common law rule of evidence than it is to a rule of statute law, even when the statute creates, in effect, a rule of evidence, *e.g.*, Statute of Frauds, s. 4.

Civil Procedure

Payment into Court, duty to allocate: R. S. C., Ord. XXII.

Although generally where money is paid into Court in respect of one or more of several causes of action the defendant must allocate between the various causes of action, in 1933 Order XXII was altered to enable the Court in a proper case to order otherwise. *Tallent* v. *Coldwell*, [1938] 1 Ch. 653, was one of the rare cases to which this power was intended to apply. The plaintiff in respect of an alleged infringement of copyright claimed damages for the infringement and for conversion. These are cumulative pleas (*Sutherland Publishing Co., Ltd.* v. *Caxton Publishing Co., Ltd.*, [1936] Ch. 323), but the defendants were allowed to pay in a single sum without specifying for which cause the money was paid in. The damage here flowed from one wrongful act—the infringement—and in assessing damages on the two grounds of claim there would inevitably be a certain amount of overlapping. The defendants would therefore be embarrassed if they had to allocate their payments amongst the various causes of action.

Court acting *extra cursum curiæ*: submission to arbitration.

The unfortunate litigation in *Wyndham* v. *Jackson* (noted in *Annual Survey*, 1937, p. 308) seems now to have been brought to a final conclusion by the Court of Appeal: (1938), 54 T. L. R. 560. This action was brought to enforce an award by a Master of the High Court who, at the request of

both parties, gave a decision on matters not covered by the Judge's order for an account. Goddard, J. (as he then was), in the Court of first instance, had treated the consent of the parties as a submission of the additional matters to arbitration by the Master. The Court of Appeal has now unanimously reversed that decision. The proceedings before a Chancery Master upon taking accounts are not a proceeding resulting in a final order binding on the parties; the Master's certificate is not binding until confirmed by the Judge. There was thus no agreement between the parties that the Master's finding should be final and binding upon them which could be construed as a submission to arbitration.

Approval of settlement of infant's claim. R. S. C., Ord. XXII, r. 14.

R. S. C., Ord. XXII, r. 14, provides that no settlement of an infant's claim for money or damages in the King's Bench Division, whether before or after the trial, shall be valid without the approval of the Court or a Judge. Where an appeal is entered, the Court of Appeal "has seisin of the matter" and is "the Court" within the meaning of the Rule. Application must, therefore, be made to that Court for approval of the settlement: *Walsh* v. *George Kemp, Ltd.*, [1933] W. N. 120.

Foreclosure action; necessary parties.

It was laid down in *Griffith* v. *Pound*, 45 Ch. D. 553, that in a foreclosure action all persons interested in the equity of redemption must be joined and that it is not sufficient to join one such incumbrancer as a representative party. It has been suggested that since 1925 this onerous rule no longer applies and that the estate owners would in most cases be sufficient parties. An attempt was made in *Westminster Bank, Ltd.* v. *Residential Properties Improvement, Ltd.*, [1938] 1 Ch. 689, to impugn the authority of *Griffith* v. *Pound*, but Simonds, J., treated that case as conclusive of the matter before him. He saw no valid reason to quarrel with it on principle or upon any supposed change in the practice of the Court. The learned Judge recognised that the result is very onerous to the mortgagee but pointed out that if the mortgagee chooses to seek the aid of the Court rather than to pursue his other remedies of sale, of the appointment of a receiver, or of going into possession, he must shoulder the burdens entailed thereby. It may be that the Court of Appeal would not regard *Griffith* v. *Pound* with so much respect as Simonds, J., having regard to the wide powers wielded by the estate owner under the Law of Property Act, 1925.

Right of third party to have judgment set aside: Road Traffic Act, 1934, s. 10.

Windsor v. *Chalcraft*, 54 T. L. R. 884, is a case of considerable importance and has produced a sharp cleavage of judicial opinion. The facts were simple. The plaintiff in a running-down action notified the defendant's insurers that a writ had been issued. The defendant entered no appearance and judgment was obtained against him by default. A summons for assessment of damages was taken out before a master and the defendant again did not appear. No notice was given to the insurers that the writ had been served or that the case had been set down for trial. The insurers applied to have the judgment set aside. Master Burnand made an order setting the judgment aside. du Parcq, J., reversed the Master's decision, but the Court of Appeal (Slesser, L.J., dissenting) reinstated the order. Greer, L.J., would have had some doubts if the case had been free from authority, but in his view the matter was clearly covered by *Jacques* v. *Harrison*, 12 Q. B. D. 186. It was decided in that case that a stranger to an action who is injuriously affected through any judgment suffered by a defendant by default, and who has the defendant's permission to use his name, may, in the defendant's name, apply to have the judgment set aside on such terms as the Judge may think reasonable or just (*per* Bowen, L.J., *S.C.* at p. 167). In the instant case the insurers were clearly adversely affected by the judgment, and, by the terms of the policy, the defendant had bound himself to allow them to use his name. Thus both the conditions specified by Bowen, L.J., were satisfied and the judgment should therefore be set aside. MacKinnon, L.J., concurred in this view and does not seem to have shared the doubts of Greer, L.J. Slesser, L.J., on the other hand, came to the same conclusion as du Parcq, J. In his view, section 10 of the Road Traffic Act, 1934, has altered the law and provides a code which "establishes the whole of the liability of the insurance company and the conditions under which that liability arises". Section 10, after imposing on insurers the liability to satisfy any judgment obtained against the insured, protects the insurance company by providing that this liability shall not arise unless notice of the bringing of proceedings is given to the insurers before or within seven days after the commencement of proceedings. In the instant case those conditions were satisfied. There was a "judgment" within the meaning of section 10 and the insurers had had notice of the issue of the writ. The

learned Lord Justice thought that *Jacques* v. *Harrison* did not apply because, the insurers having failed to avail themselves of their statutory protection, there was no injustice to be rectified by a subsequent hearing or, if there was any injustice, it was imposed by statute. Leave to appeal to the House of Lords was granted.

Third party proceedings: Road Traffic Act, 1934, s. 10.

This case lends added point to the strictures directed against section 10 in *Cross* v. *British Oak Insurance Co.*, [1938] 2 K. B. 167, where du Parcq, J., expressed the view that those responsible for the Act must have legislated in ignorance or forgetfulness of the procedure in the Courts of this country. The defendant in a running-down case joined a third party against whom he claimed an indemnity or contribution. The third party counterclaimed for damages. Ultimately the third party succeeded on the counterclaim and brought an action under Road Traffic Act, 1934, s. 10, against the defendant's insurance company to recover the amount of the judgment and costs both as third party and on the counterclaim. The Court held that, so far as concerned the judgment for damages, the proceedings commenced with the counterclaim and as the plaintiff had given no notice to the defendant company he was not entitled to recover the damages from the company. As regards costs of the third party, the proceedings began with the third party order and a proper notice was given.

Road Traffic Act, 1934, s. 10: notice of commencement of proceedings.

It was held in *Herbert* v. *Railway Passengers' Assurance Co.*, 158 L. T. 417, that the notice of commencement of proceedings under the Road Traffic Act, 1934, s. 10, must really be a notice in the sense that it is given formally as a notice. It is not sufficient if the information is imparted informally in the course of casual conversation.

"Matter of practice and procedure": R. S. C., Ord. LIV, r. 23.

By the joint operation of the Judicature Act, 1925, s. 31 (3), and R. S. C., Ord. LIV, r. 23, in the King's Bench Division appeals from a Judge in chambers go to a Divisional Court, except in matters of practice and procedure, when the proper tribunal is the Court of Appeal. There is a long line of cases dealing with what is a "matter of practice or procedure" within the meaning of the Act and Rule. This difficult question again arose in *Shoesmith* v. *Lancashire Mental Hospital Board*, 54 T. L. R. 940. This was an appeal from an order of Asquith, J., granting leave under the Mental Treatment Act, 1930, s. 16 (2), to the respondent, Shoesmith, to bring an action against the Board for an

assault committed by an escaped patient. It was contended that this was not an appeal on a matter of practice and procedure and therefore the appeal should have gone to a Divisional Court. The Court of Appeal (Greer, L.J., dissenting) held that the question was one of practice and procedure and that the Court had jurisdiction to entertain the appeal. Greer, L.J., in his dissenting judgment, considered that an application for leave to bring an action is a substantive application to a Judge of the High Court; there was no case, he said, in which an application preliminary to the issue of the writ had ever been dealt with as a matter of practice and procedure. He reinforced his view by pointing out that an application for leave under the Act of 1930 is necessary whatever the nature of the proceedings contemplated. In his view, therefore, it is impossible to say that an application of that sort is an application with reference to proceedings in the High Court, which is the only case to which the Judicature Act and Order LIV apply. Slesser and MacKinnon, L.JJ., on the other hand, came to the conclusion that the application for leave was part of the procedure, having regard to the observation of Buckley, L.J., in *Yonge* v. *Toynbee*, [1910] 1 K. B. 215, 220, that "the expression 'practice and procedure' is not confined to steps in the action itself, but covers also matters in connection with the action". The application for leave to start proceedings is not a matter of substantive right, but is adjectival to the substantive right which is sought to be achieved. MacKinnon, L.J., could see no distinction between an application to serve a writ—which application is a matter of practice and procedure (*Black* v. *Dawson*, [1895] 1 Q. B. 848)—and an application for leave to issue and serve a writ. In his opinion "practice and procedure" includes any matter in connection with an action or proposed action.

Right of Court of Appeal to review previous decisions.

This case is destined for fame, since in the course of their judgments both Greer and Slesser, L.JJ., asserted, though *obiter*, the right of the Court of Appeal to review and overrule its own previous decisions.

Appeal from referee's award: proper tribunal. R. S. C., Ord. LIXA, r. 1.

Another case in which the question was in what Court the parties ought to proceed was *Telsen Electric Co., Ltd.* v. *Eastick & Sons (No. 2)*, [1938] 1 All E. R. 486. In the trial of the action the Judge decided the principle governing the matter and directed an inquiry as to damages. An application was made to set aside the referee's award and

the question arose whether the application should be made to a single Judge of the King's Bench Division or to a Divisional Court. The Judicature Act, 1925, s. 90 (2), provides that the report or award of an official or special referee shall, unless set aside by the Court or a Judge, be equivalent to the verdict of a jury. R. S. C., Ord. LIXA, r. 1, provides that appeals from the report or award of a special referee shall lie, in the Chancery Division to the Judge in Court, and in the King's Bench Division to a Divisional Court. Lawrence, J., decided that an appeal from a reference under section 89 (2) of the Judicature Act, 1925, is covered by Order LIXA, r. 1 and lies, therefore, in the King's Bench Division, to a Divisional Court. The words "or a Judge" in section 90 (2) do not refer to a single Judge of the King's Bench Division so as to confer upon him a jurisdiction co-ordinate with that which is conferred upon a Divisional Court by Order LIX, but were inserted to give effect to the practice in the Chancery Division.

Striking out claim *prima facie* barred by Limitation Act, 1623.

Although the case of *Dismore* v. *Milton*, [1988] W. N. 305, breaks no new ground it is worthy of special mention because it emphasises a point on which misleading statements appear in the *Annual Practice* and in *Gatley on Libel and Slander*. It appeared on the face of the statement of claim that the cause of action arose at a time before the period prescribed by the Statute of Limitation. Lawrence, J., made an order striking out the statement of claim on the ground that it disclosed no cause of action. The Court of Appeal unanimously reversed this decision. The Court drew a distinction between the Statute of Limitation, which relates to personal actions, and the Real Property Limitation Act, 1833.

The operation of the latter Act is extinctive and the plaintiff has therefore no title on which to found his claim. If the plaintiff relies on section 8 of the Act to extend the period he must plead the excepting circumstances in the statement of claim. In a personal action the operation of the Statute of Limitation is not absolute and by reason of the exceptions contained in section 7 of the Act of 1623 a limitation which would otherwise apply might not apply. Until the statute is pleaded there is no opportunity for the plaintiff to raise the point that the statute does not apply. The statements in *Gatley* and the *Annual Practice*, referred to above, are founded on *Price* v. *Phillips*, 11 T. L. R. 86,

which was concerned with the Real Property Limitation Act, 1833, only.

Non-existence of defendant; powers and duty of the Court.

In *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou*, 158 L. T. 364, there was ground for thinking that the defendants, the Banque des Marchands de Moscou, had ceased to exist some years before the issue of the writ; neither party placed before the Court any evidence as to the existence or non-existence of the defendants. It was held that the Court has not only inherent power, but a duty, in order that there may be no abuse of its process, to make such order as it deems necessary to ascertain the truth on this issue. In this case the Court directed the Official Solicitor to investigate the matter and to adduce evidence on this issue and as to the authority of one, C., at one time a director of the bank, to act on its behalf in the year 1930. Information as to the evidence proposed to be adduced by the Official Solicitor was to be supplied to the parties. On the evidence being adduced the parties were to be at liberty to cross-examine and themselves call evidence on these issues. If a plaintiff has recovered judgment for a sum of money against a defendant named in the action who appeals and on the appeal the Court of Appeal find that the defendant was not in existence at the date of the issue of the writ, although there is no appellant in existence, the Court has power to deal with the existing judgment and to strike out the action.

Joinder of insurance company as defendant: R. S. C., Ord. XIX, r. 27.

A very important question arose in *Carpenter* v. *Ebblewhite*, [1938] 4 All E. R. 41; it is only discussed briefly here as it is probable that the matter will be considered later by the House of Lords. The plaintiff had been injured by a motor car driven by the defendant B. It was in dispute whether the defendant E had sold the car to B, or whether B was driving it as his agent. The plaintiff obtained leave to join E's insurance company as a defendant. In the statement of claim the plaintiff claimed that the insurance company was liable to satisfy any judgment obtained against E or B. An application to strike out such portions of the statement of claim as referred to the insurance company was successful before Goddard, J., and upheld by the Court of Appeal. Greer, L.J., decided against the plaintiff on the ground that no dispute could arise between the insurance company and the plaintiff until the action between the plaintiff and E had been disposed of. There can be no claim

for a declaration where no dispute has arisen between plaintiff and defendant. The claim against the insurance company was, therefore, vexatious and frivolous and should be struck out. Counsel for the insurance company had also relied upon the established rule of practice that, in an action against a motorist, the fact that the defendant is insured should not be disclosed, nor should the insurance company be brought in by third party procedure (*Gower* v. *Hales*, [1928] 1 K. B. 191), a rule apparently not limited to cases where there is a jury (*Jones* v. *Birch Bros., Ltd.*, [1933] 2 K. B. 597). Greer, L.J., was of opinion that this rule is no longer operative since the passing of the Road Traffic Act, 1934, "because, since the time that it has been provided by statute that every owner of a motor car must be insured, that matter would be present to the minds of the jury just as much, though not a word was said about it, as if it was proclaimed from the housetops". Slesser, L.J., on the other hand, did not agree that in the instant case the rule had been abrogated by the Act of 1934. On the special facts of this case the joinder of the insurance company would embarrass the action. This was not a case where, if the plaintiffs succeeded, the insurance company was automatically liable. On the declaration the jury could not but be aware that they must find on the question whether the car had been sold or not. They would know that they were finding in effect for or against the insurance company. Thus the mischief which the former rule of practice was designed to avoid was still present, "just as much and just as cogently and just as prejudicially as before the passing of the Road Traffic Act of 1934".

MacKinnon, L.J., did not comment on this aspect of the case, but preferred to base himself on the ground that the claim for a declaration was inappropriate, since the liability of the defendant company depended upon questions of fact, whereas declarations of liability are designed rather to deal with questions of law.

It may be suggested, with respect, that the position with regard to the rule of practice is this: it is, for the reasons suggested by Greer, L.J., immaterial whether the jury are told that the defendant is insured, but there may be cases—such as the instant case—where the joinder of the insurance company would embarrass the trial of the action. In such circumstances the Court should, under Order XIX, r. 27, strike out the claim against the insurance company.

Company cannot appear in person.

In *Frinton U. D. C.* v. *Walton, etc. Mineral Co.*, 54 T. L. R. 369, the Court affirmed the accepted rule that a company cannot appear in person whether by its managing director, secretary or otherwise.

Remission to county court; review of Judge's discretion.

Phillips v. *Lloyd & Sons*, [1938] 2 K. B. 282, is interesting as a commentary upon the important trilogy of cases, *Stevens* v. *Walker*, [1936] 2 K. B. 215, *Culver* v. *Beard*, [1937] 1 All E. R. 301 (now reported as a note to the instant case, [1938] 2 K. B. 292 n.), and *Evans* v. *Bartlam*, [1937] A. C. 473. This was an appeal against a Judge's order remitting a case to the county court. The Court, fortified by *Evans* v. *Bartlam*, had no hesitation in reaffirming the rule laid down in *Stevens* v. *Walker*, that when the Court comes to the conclusion that the Judge has not given adequate weight to the considerations that ought to weigh with him, then the Court may exercise its own discretion and may reverse the order of the Judge. In so far as there is any discrepancy between *Stevens* v. *Walker* and *Culver* v. *Beard*, the Court will regard itself as bound by the former. The same principles were applied in *Berridge* v. *Everard*, [1938] 1 All E. R. 717, a case which raised questions on the valuation of the loss of expectation of life; these must be considered difficult questions of law, and it was therefore desirable that the case should be heard in the High Court.

"Rolled-up" plea: particulars.

In *Tudor-Hart* v. *British Union for the Abolition of Vivisection*, [1938] 2 K. B. 329, the Court of Appeal decided with some reluctance that when, in an action for libel, the defendant pleads the "rolled-up" plea, the Court will not order him to deliver particulars stating which of the allegations in the words complained of he relies on as being statements of fact, and which as being expressions of opinion; nor will the Court order him to give particulars of the facts on which he relies as being the basis of his comments where the plea limits the facts to "the said facts". If the question had been free from authority the Court would have inclined to the contrary view expressed by Scrutton, L.J., in *Agha Khan* v. *The Times Publishing Co.*, [1924] 1 K. B. 675, 682, and suggested by Atkin, L.J., in *Hobbs* v. *The People Publishing Co.*, The Times, March 30, 1926. The matter is, however, the subject of *dicta* in the House of Lords and of a decision of the Court of Appeal, the *Agha Khan Case* (*supra*), to the effect that the claim for particulars is objectionable.

Duty of Judge in

Infields, Ltd. v. *Rosen & Son*, [1938] 3 All E. R. 592,

Chancery Division on adjournment of claim of privilege.

raised a point of some difficulty upon the practice to be followed in cases where privilege has been claimed in an affidavit of documents. In an action in the Chancery Division the plaintiffs upon discovery claimed privilege for certain documents. Upon a summons before the Master, and by agreement between the parties, the Master inspected the documents under Order XXXI, r. 19A (2) and came to the conclusion that the documents ought to be produced. He therefore ordered production subject to the parties' right to have the matter adjourned to the Judge. The plaintiffs exercised that option and the matter came before Farwell, J., who made an order for production. The Judge did not himself inspect the documents or receive from the master any report as to their nature and contents. In these circumstances the Court of Appeal held that the Judge's order must be discharged. The hearing of the matter by the Judge on adjournment in the Chancery Division is not by way of an appeal, but in order that the matter may be dealt with by the Judge in person and not by the Master. The Judge must consider the materials which were before the Master—he is entitled for this purpose to use the Master's report—and then come to his own conclusions on the point of law submitted to him. It is not sufficient that he should merely accept the Master's view without himself considering it. MacKinnon, L.J., suggested that a different rule may apply in the King's Bench Division. There a litigant in an interlocutory matter is not entitled as in the Chancery Division to the decision of the Master or the Judge at his option, but primarily only to the decision of the Master, from which he can appeal to the Judge. If an appeal is possible from an order under Order XXXI, r. 19A (2) to the Judge then it is doubtful whether the Judge could be required to inspect the documents over again. If such a right of appeal does exist—which may be doubted in the light of *Bustros* v. *White*, 1 Q. B. D. 428—there ought to be a new rule barring any such appeal.

Administrative body exercising judicial powers.

In *Toronto City Corporation* v. *York Township*, [1938] A. C. 415, the Privy Council advised that powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a Court of justice, are not inconsistent with the powers of an administrative body the duty of which it may be to ascertain the facts with which it is dealing.

Retrospective effect of Law

In *Bank of Athens* v. *Royal Exchange Assurance Co.*,

[1938] 1 K. B. 771, it was decided that section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, is retrospective and that the discretion to award interest given to the Court by that section may be exercised in proceedings commenced before the Act came into force as well as in proceedings commenced thereafter.

Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1).

Service of process is always regarded as a matter of great strictness and the essential thing in service is that the documents shall be brought to the personal knowledge of the person whose concern it is. The rules as to service apply with equal strictness to service of a bankruptcy petition. Thus in *Re a Debtor (No. 441 of 1938)*, [1938] 4 All E. R. 92, the Court of Appeal held that mere proof of delivery of a bankruptcy petition in a sealed envelope, in the absence of evidence that the contents of the documents actually came to the knowledge of the debtor, is not a sufficient service. This case, in conjunction with *Re a Judgment Debtor*, [1937] Ch. 137, and *Re De Cespides*, 156 L. T. 471, should finally dispel any idea that service of bankruptcy process is governed by less rigid rules than the service of ordinary process.

Service of bankruptcy petition.

A point of practice "of some importance and not without difficulty" arose in *Att.-Gen.* v. *Prossor*, 54 T. L. R. 988. The appellant was served with certain assessments to super-tax at a time when he was living abroad. He ignored these assessments. A writ was then issued under the Crown Suits Act, 1865, s. 37, for service out of the jurisdiction. The Crown obtained judgment and enforced it by execution. The appellant in the present appeal moved to have the judgment and service of the writ set aside. It was contended on his behalf that the amendment in 1932 of Order LXVIII had the effect of substituting the provisions of Order XI with regard to service out of the jurisdiction for the provisions of the Crown Suits Act, 1865, s. 37, so far as they relate to service. The Court of Appeal admitted that the Rule Committee has power to modify or repeal existing statutes in so far as they relate to matters of procedure, but held that the amendment of Order LXVIII did not have the drastic effect for which the appellant contended. The real purpose of the amendment was to apply to proceedings on the revenue side the provisions of Order XI, r. 11, which was amended at the same time and provides for the adoption of certain machinery for service in cases where conventions have been made with foreign countries in that behalf. Though such may have been the

Service out of the jurisdiction in Crown suits: R. S. C., Ord. LXVIII.

intention of the Rule Committee it is submitted that there is room for doubt whether the general terms of Order LXVIII, r. 8, do not go beyond this specific purpose.

Service out of the jurisdiction; variation by statement of claim.

Order XI, r. 1, prevents service out of the jurisdiction of a writ of summons upon a person domiciled or ordinarily resident in Scotland for a cause of action in respect of breach of a contract made within the jurisdiction. The plaintiff in *Waterhouse* v. *Reid*, [1938] 1 K. B. 748, had obtained leave to serve notice of the writ in Iraq on a defendant domiciled in Scotland, claiming damages for fraudulent misrepresentation. By his statement of claim, which was served with the writ, the plaintiff claimed not only for fraudulent misrepresentation but also for breach of warranty—a claim in contract. The Court of Appeal unanimously decided that the statement of claim must be amended so as to omit any claim for breach of warranty. The power to vary by the statement of claim does not give a plaintiff a right to insert in his statement of claim a cause of action which, if indorsed on the writ, would have prevented leave to serve it out of the jurisdiction being granted.

Foreign judgments.

The decision of MacKinnon, J., in *Yukon Consolidated Gold Corporation* v. *Clark*, 157 L. T. 259, which was noted in the *Annual Survey*, 1937, p. 337, has now been affirmed by the Court of Appeal, [1938] 2 K. B. 241 (see the Section on Conflict of Laws, *infra*, p. 381).

Reference under Landlord and Tenant Act, 1927, s. 21; form of report.

In *Freeman* v. *Dartford Brewery Co.*, 54 T. L. R. 672, du Parcq, J., gave an important ruling on the proper form of the report of a referee to whom a reference is made under the Landlord and Tenant Act, 1927, s. 21. The learned Judge pointed out that it is clear from the remarks of Scrutton, L.J., in *Simpson* v. *Charrington & Co., Ltd.*, [1934] 1 K. B. 64, 76, that the County Court Judge may review the findings of the referee. It is, therefore, essential that the referee should put his report in a form which makes it possible and not unreasonably difficult for the Judge to do so. "The referee is not merely to make an award as would an arbitrator, or to give a verdict as would a jury." He must set out generally his findings of fact, referring in each case to the evidence supporting those findings of fact and on which they are based. He must state also the inferences which he draws from the findings of fact. Although this case arose under the Landlord and Tenant Act, 1927, the principle is one of general application. The object of a reference is to save the

time of the Court, and unless the referee makes his report in this form the inquiry would be fruitless.

Appeal by one of several defendants; costs of co-defendants.

In *Hopgood* v. *Willan*, [1938] W. N. 107, the Court of Appeal gave an important ruling on a point of practice. It is a familiar rule that service of notice of appeal does not entitle the person served to his costs of appearing on the appeal if such appearance is unnecessary. In the instant case the Court held that on an appeal by one joint tortfeasor his co-defendants should be made parties to the appeal, and they are entitled to be heard. They are interested in the question of costs and, by virtue of the Law Reform (Married Women and Tortfeasors) Act, 1935, they are also interested in the question of contribution. They are therefore entitled to the costs of their appearance at the hearing of the appeal.

Joint tort-feasors; offer to pay proportion of any liability: Ord. XXX, r. 2.

In *Sigley* v. *Hale*, [1938] 2 K. B. 630, one joint tortfeasor applied, on the summons for directions, for an order allowing him to write to the other defendant offering to pay a proportion of any damages that might be found against the defendants, such offer to be regarded as notice of payment into Court in proceedings between the defendants. Under the old Order XXX, r. 2, the Judge had a very wide discretion as to the orders he might make on a summons for directions, and it has been the practice of the Judges to make orders in this form. Order XXX was amended in 1937 and the Judge's powers on the summons for directions now "include those specified" in the new rule 2. In the instant case the Court of Appeal decided that the powers of the Judge are now confined to making the various orders specified and any orders that can be justified by reference to any other provisions of the Rules. There is no power in the new rule to make the order sought, nor is there any power to make it under any other rule. The order was accordingly refused. The Court came to this conclusion reluctantly, and we respectfully echo the regrets of MacKinnon, L.J., at this hampering of the flexibility of the procedure of the Court. It may perhaps be suggested, with respect, that a wider interpretation was possible. "Include" clearly does not mean "include only", and there seems no imperative reason to confine the residuary discretion to such powers only as can be referred to some specific provision in the Rules.

Costs of remitted action:

Simmons & Son, Ltd. v. *Wiltshire*, [1938] 3 All E. R. 408, deals with costs of a remitted action. In an action in the

R. S. C., Ord. XIV.

High Court proceedings under Order XIV were taken and the case was remitted to the county court. The district Registrar made an order that the costs up to the time of remission should be costs in the cause. It was contended that the effect of the order, taken in conjunction with the County Courts Act, 1934, s. 78, was to reserve these costs to the discretion of the Judge who tried the case, *i.e.*, the County Court Judge. The Court of Appeal rejected this contention. The Registrar was making a decision as to costs that had been incurred in the High Court and his order must be taken to refer to costs on the High Court scale. The proviso to section 78 of the Act of 1934 clearly reserves to the Court ordering the transfer power to make an order as to costs. If the Judge had exercised his discretion in this case he would be altering the order made by the Registrar in the High Court and would be acting without jurisdiction.

New trial: order for stay of costs of appeal until after second trial.

In *Stevens* v. *Economic House Builders, Ltd.*, [1938] W. N. 55, the Court of Appeal made a novel order with respect to costs. In the Court below the Judge decided in an action for negligence that there was no evidence to go to the jury, and he entered judgment for the defendants with costs. A bankruptcy notice in respect of these costs was served on the plaintiff and was not complied with. On appeal the Court of Appeal ordered a new trial. In the circumstances the Court granted a stay of the order for costs of the appeal until after the hearing of the new trial, in order that the defendants, if they again succeeded at the trial with costs, should have an opportunity to set these costs off against the costs of the appeal which they would have to pay.

Solicitor: disciplinary powers of the High Court.

There are two important cases dealing with the disciplinary powers of the High Court over solicitors: *Brendon* v. *Spiro*, [1938] 1 K. B. 176, and *Myers* v. *Rothfield*, [1938] 3 All E. R. 498. The former was discussed at some length in the *Annual Survey*, 1937, p. 310. *Myers* v. *Rothfield* can be dealt with briefly as leave to appeal to the House of Lords was granted and the matter will probably be reviewed in that tribunal. The misconduct charged against the solicitor in this case was twofold: (*a*) that, with knowledge that the defence was not likely to succeed, he filed a defence putting the plaintiff to proof of her allegations; (*b*) that he had prepared affidavits of documents which no solicitor could help knowing were inadequate. It was proved that the whole of the litigation had been left to the solicitor's unadmitted managing

clerk. The trial Judge and the Court of Appeal were at one in refusing to treat the first allegation as punishable misconduct. On the second point, Greer and Slesser, L.JJ., concurred in the view that the inherent jurisdiction of the Court rests on the ground of *personal* misconduct and that it is a necessary condition of the exercise of the jurisdiction that the misconduct should be brought home to the solicitor himself. The solicitor cannot be made liable because it is proved that a clerk whom he was entitled to trust has been guilty of the conduct of which complaint is made. MacKinnon, L.J., taking a different view of the authorities, dissented from the majority opinion. The dissenting view seems hardly to take sufficient account of the essentially personal character of the misconduct upon which the jurisdiction is founded and which Singleton, J., defined as "something which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute" (approved by Greer, L.J., at p. 500).

Distress; validity of charges by bailiff with "walking possession".

Day v. *Davies*, [1938] 2 K. B. 74, is a case "of considerable importance to bailiffs and those who are reluctantly compelled to entertain them" (Slesser, L.J.). The plaintiff made a written agreement with a bailiff, D., who had distrained on the goods and chattels of the plaintiff for arrears of rent, that D., in consideration of not leaving a man in possession should have "walking possession" and the plaintiff would pay all costs. D. did not go into actual possession but visited the premises on each of five days and charged the plaintiff 6s. for each of these days. The plaintiff paid these fees but later made a successful application for their recovery. The Court of Appeal unanimously upheld this decision. Whether the matter were founded on rule 22 of the Distress for Rent Rules, 1920, or upon the language of the Distress (Costs) Act, 1817, s. 1, the bailiff was not entitled to any charges other than those specified in, and authorised by, the table in Appendix II, Scale II (2) of the 1920 Rules. The Rules only provide for a fee for a man in possession; in this case there was no man in possession and therefore no fee was chargeable. Furthermore, the effect of the Act of 1817 and the Rules of 1920 is to prohibit any charge other than those expressly authorised. Therefore no reliance could be placed upon a special agreement to pay a charge expressly prohibited by statute.

S. R. & O., No. 1712/L.47.

Three cases noted in the *Annual Survey*, 1937, have now

been reported as follows: *Rowell* v. *Pratt*, [1938] A. C. 101; *Culver* v. *Beard*, [1938] 2 K. B. 292 *n.*; *Hagen* v. *National Provincial Bank, Ltd.*, [1938] 1 K. B. 169.

LITERATURE

New Books

The County Court Litigant. By R. W. Frazier. Solicitors' Law Stationery Society. 1938. xviii and 208 pp. 17s. 6d.

This book contains a comprehensive collection of precedents of pleadings in county court proceedings. The forms are arranged alphabetically and everything has been done by way of cross-references and index to facilitate their use. Under most of the titles there are short notes on points of law. On the whole these notes are informative, accurate and up-to-date, although occasionally the brevity with which they are necessarily expressed makes what is said rather misleading. The book provides precedents for claims under certain recent statutes such as the Housing Act, 1936, the Factory Act, 1937, and the Livestock Industry Act, 1937. The section on hire-purchase agreements stands in need of revision in the light of the recent legislation.

Gibson's County Court Practice. By B. Passingham. 1938. Law Notes Publishing Co. xxvii and 200 pp. 15s.

County court procedure is now within the syllabus for the Solicitors' Final Examination and so the Law Notes Publishing Co. have added yet another to their series of students' text-books. Mr. Passingham carries on an excellent tradition of accurate and lucid yet brief exposition. The book is concerned with the general jurisdiction of the county courts and omits jurisdiction under special statutes. The addition of a number of forms in common use makes the text easier to follow. The price, like that of companion volumes, seems high for so small a volume.

The Evidence Act, 1938. By R. Burrows and C. M. Cahn. Sweet & Maxwell, Ltd. 1938. 55 pp. 3s. 6d.

This pamphlet contains a thorough examination of the Act. Lord Maugham contributes a prefatory note in which he explains the genesis and purport of the Act. In a section

of thirty-three pages the learned authors discuss the Act in relation to the established principles of the law of evidence, with frequent cross-references to *Cockle's Cases* and the two *Phipson* text-books. The text of the Act is also set out in full. This pamphlet is an essential supplement to the new edition of *Cockle's Cases*.

Reasonable Doubt. By G. de C. Parmiter. Arthur Barker. 1938. xv and 331 pp. 15s.

In this book Mr. Parmiter disclaims any intention to discredit the "twelve good men and true" but nevertheless exposes a good many of the limitations of trial by jury.

After a short introduction in which he examines some of the contentions of the antagonists and protagonists of the system, he devotes the bulk of the book to an examination of the jury in action. He has selected a number of celebrated criminal trials with a view to demonstrating that "reasonable doubt" may well exist where it is negatived by the verdict of the jury.

Nevertheless, the reviewer was left with the impression that on the whole the jury comes well out of the cases considered. In any case the printed evidence never reproduces entirely the materials on which the jury legitimately relies, a fact which the Court of Appeal always bears in mind when asked to disagree with the verdict of the jury.

An appendix on the development of the jury system suffers a little from compression. The author does not always seem to distinguish clearly between the grand and petty juries, and the abolition of the former is not noticed.

In a second appendix the author applies the mathematical theory of probability to the verdicts of juries and reaches some startling conclusions. Thus, on the assumption that every juror is right three times out of four, then the odds in favour of a unanimous verdict being right are 531,441 to 1. The sting is taken out of these rather formidable calculations by the assumption that every juror arrives at his decisions independently of every other juror.

New Editions

Wills on Evidence. Third edition. By J. D. Finlaison. Stevens & Sons, Ltd. 1938. lxxxiv and 551 pp. 25s.

It is a matter for regret that thirty years have passed

since the last edition of this work. The new edition now takes its place as the leading students' text-book on the subject. The virtues of clarity and logical arrangement are retained in the present edition and the task of bringing the book up to date has on the whole been faithfully performed. This cannot be said, however, of the Appendix of Public Documents; a number of recent statutes are omitted altogether and some consolidations of the existing statute law have not been noticed. The learned editor has also overlooked the very important case of *Morton* v. *Morton*, [1937] P. 151.

By good fortune the Evidence Act, 1938, appeared early enough for incorporation in the text. The Act is also fully discussed in a separate chapter and is set out in full in the Appendix of Statutes. Estoppel is excluded in this, as in the second, edition. Whilst sympathising with the reasons for its omission, we should have welcomed a comprehensive treatment of this agile rule of evidence in place of the rather scrappy treatment accorded to it in books on the special fields in which it operates.

Cockle's Cases and Statutes on Evidence. Sixth edition. By C. M. Cahn. Sweet & Maxwell, Ltd. 1938. xlvii and 600 pp. 18s. 6d.

There is no need to acknowledge the debt owed by teachers of law to this famous case-book. The present edition brings the law up to date to the end of 1937. There is one surprising omission. Under the heading of corroboration nothing is said of the Road Traffic Act, 1934, s. 2 (3). The book appeared before the Evidence Act, 1938, had become law and readers should supplement it by the pamphlet on the Act by Messrs. Burrows and Cahn reviewed above.

Stephen's Commentaries on the Laws of England. Vol. I. Twentieth edition. By various editors. Butterworth. 1938. xv, 615 and 57 pp. 32s. 6d.

The arrangement of *Stephen's Commentaries* has been modified in this edition in order to meet the requirements of students preparing for Paper III of the Law Society's Intermediate Examination. Book I of the first volume deals with the history, organisation and procedure of the Courts. There is also a special section on the legal profession. The effects of the Administration of Justice (Miscellaneous Provisions) Act, 1938, are noted and there is a new section on

matrimonial causes. Book II is devoted to Constitutional and Administrative Law. The present volume well maintains the tradition of *Stephen's Commentaries.*

Notes on District Registry Practice and Procedure. By T. S. Humphries. Fourth edition. 1938. Solicitors' Law Stationery Society. 5s.

Substantial changes have had to be made in this handy little book as a result of changes occasioned by the Matrimonial Causes Act and Rules, 1937, and recent amendments of the Rules of the Supreme Court.

Town Practice for the Tyro. Third edition. By the Editors of Law Notes. 1938. Law Notes Publishing Co. viii and 108 pp. 4s. 6d.

This little book is a reprint of articles which have appeared in *Law Notes* and should prove useful to the inexperienced articled clerk taking his first steps along the tangled paths of High Court procedure. Students for the Bar Examination would profit by reading the book as a preliminary to more serious study of the law of procedure.

The A. B. C. Guide to Practice, 1939. Thirty-fourth edition. By P. J. Bowie. Sweet & Maxwell; Stevens. 207 pp. 7s. 6d.

Articles

Exclusion of Similar Fact Evidence: American. By Julius Stone, 51 Harvard Law Review 988 *et seq.* This is a sequel to the author's article on the same subject from the point of view of English law (see 46 Harvard Law Review 954). In that article the author came to the conclusion that "the greatest factor in producing the intractability of the decisions on this rule was not inconsistent holdings as to relevance but conflicting views as to the scope of the rule of law which was being applied, a conflict only finally settled in *Makin* v. *Att.-Gen. for N.S.W.*" He traces the evolution in the American decisions of the spurious rule that evidence of all other bad acts is excluded unless it falls within a specified list of exceptions. Under the original rule, evidence relevant merely to propensity was excluded. English law shook itself free from the spurious rule in *Makin's Case,* but

the American counterpart of that case, *People* v. *Molineux*, was less decisive.

In the Cambridge Law Journal (Vol. VI, No. 3, pp. 367 *et seq.*) Mr. R. M. Jackson discusses "Trial by Jury To-day". He explodes a good many of the fallacious claims put forward on behalf of trial by jury, but suggests that some of the criticisms are really criticisms not of the system itself but of the way in which it is worked. His conclusion is worth quoting: "All I ask is that in any change that is made we try to give the right reasons, and that jury trial shall not be discredited because we work it badly or because we wish to avoid adequate judicial strength." The same learned author, in 1 Mod. Law Review, pp. 132 *et seq.*, makes a statistical analysis of "The Incidence of Jury Trial during the Past Century".

The following notes and articles also appeared during the year under review:—

The Reform of Legal Procedure, by G. Webber, 16 Can. Bar Rev. 622.

Legal Aid for the Poor, 86 Law Journal 244.

Evidence Act, 1938, by Julius Stone, 85 Law Journal, pp. 409, 424, 441.

New High Court Rules (*R. S. C.* (*No. 3*) *1937*), by W. P. M., 85 Law Journal 84.

Disciplinary Committee of the Law Society, 85 Law Journal 237, 257.

Estoppel by Record, 86 Law Journal 274.

CONFLICT OF LAWS

LEGISLATION

Statutes

Finance Act, 1938 (1 & 2 Geo. 6, c. 46).

The *Finance Act*, 1938, contains in section 28 far-reaching amendments with regard to the taxation of income transferred to persons abroad with the object of avoiding income tax and surtax. From the point of view of Private International Law it is interesting to note that (sub-section 4) "for the purpose of this section any body corporate incorporated outside the United Kingdom shall be treated as if it were resident out of the United Kingdom whether it is so resident or not".

Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. 6, c. 63).

By section 13 of the *Administration of Justice (Miscellaneous Provisions) Act*, 1938, machinery is provided for the purpose of giving effect to international Conventions by which the contracting parties mutually submit to the jurisdiction of their respective Courts. As soon as the date of the coming into force of such a Convention is certified by Order in Council, the foreign sovereigns who are parties to the Convention are deemed to have submitted to the jurisdiction of the Supreme Court for the purposes of proceedings against themselves or in respect of their property. The Court, when determining the scope of its own jurisdiction, must give effect to the terms of the Convention, including the provisions prescribing "the mode of proof of any material circumstance". The Order in Council will also be conclusive proof as to who are the High Contracting Parties to such Conventions, to what territories they apply, and kindred matters.

Trade Marks Act, 1938 (1 & 2 Geo. 6, c. 22).

The sections of the Trade Marks (Amendment) Act, 1937, mentioned in *Annual Survey*, 1937, p. 318, are now embodied in the consolidating statute. They are *Trade Marks Act*, 1938, ss. 60 (2), 22 (4) and 31.

Patents, etc. (International Conventions) Act, 1938 (1 & 2 Geo. 6, c. 29).

The *Patents, etc. (International Conventions) Act*, 1938, provides in sections 4, 5 and 6 for three new sub-sections to be inserted in the "Convention" section 91 of the Patents and Designs Act, 1907—1932. Under these new provisions a person who has acquired the rights of several applicants abroad can claim the Convention priority as if all the applica-

tions had been made by the same applicant. Moreover, in judging the question of conformity, regard shall be had to the disclosure contained in the whole of the documents put forward at the same time as, and in support of, the application in the Convention country, if copies are filed with the Patent Office. An appeal to the Appeal Tribunal lies against a refusal by the Comptroller to accept a patent application or to accept a specification on the ground of non-compliance with any requirement of the Conventions section. The provision under which any trade mark the registration of which has been duly applied for in the country of origin may be registered under the Trade Marks Act, 1905, is repealed by section 7 of the Act. Section 8 provides for a new sub-section 5 to be inserted in section 91 of the principal Act. By this new clause any person is deemed to have made an application in a Convention country if he has applied for protection for any invention, design or trade mark by an application which *either* (*a*) in accordance with the terms of a treaty subsisting between any two or more Convention countries, is equivalent to an application duly made in any one of those Convention countries, *or* (*b*) in accordance with the law of any Convention country, is equivalent to an application duly made in that Convention country. A new definition of a "Convention country", replacing the old sub-sections 5 and 6 of section 91, is introduced by section 9 of the new Act.

Inheritance (Family Provisions) Act, 1938 (1 & 2 Geo. 6, c. 45).

The *Inheritance* (*Family Provisions*) *Act*, 1938, contains an important provision affecting the conflict of laws. The restriction imposed upon a testator's power to dispose of his property applies only if the testator was domiciled in England at the time of his death, and it does not matter, apparently, whether and to what extent his estate consists of immovable or of movable property. It had hitherto been assumed that the essential validity of a will was governed as to movables by the law of the testator's last domicil and as to immovables by the *lex rei sitæ*. This principle applied and would still seem to apply to restrictions imposed on a testator's power to dispose by some foreign system of law, including Scottish law. The English restriction, however, which was introduced by the new Act, does not apply to English land forming part of the estate of a testator domiciled abroad, while it does apply to the proceeds of foreign land belonging to the estate of a domiciled Englishman. The Act may give rise to

numerous other difficulties in Private International Law, especially in connection with its application by foreign Courts.

Statutory Rules and Orders

The *Arbitration (Foreign Awards) No. 1 and No. 2 Orders*, 1938, make the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and Part I of the Arbitration (Foreign Awards) Act, 1930, applicable in relation to British India and to Danzig. S. R. & O., No. 137 and No. 1360.

The *Naturalisation (Burma) Regulations*, 1938. Dated March 4, 1938. S. R. & O., No. 172.

The *Burma (Non-Domiciled Parties) Divorce Rules*, 1938. Dated February 28, 1938. S. R. & O., No. 188.

The *Patents (Amendment) Rules*, 1938, dated July 20, 1938, give effect to changes in Convention applications, under the Patents and Designs Act, 1938. S. R. & O., No. 718.

The *Evidence (Commonwealth of Australia) Order*, 1938, made under the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, admits certificates of entries in Australian Public Registers as evidence in English Courts. S. R. & O., No. 739.

The *Reciprocal Enforcement of Judgments (British India and British Burma) Order*, 1938, is the first Order in Council made under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933, by which the registration machinery provided by the 1933 Act is extended to a part of the British Commonwealth. Reciprocity was granted to judgments of the Superior Courts of the United Kingdom by a new section in the Indian Code of Civil Procedure, which also applies in Burma. The High Courts and all District Courts in India and Burma are among those which are specified as Superior Courts and whose decrees are henceforward capable of being registered in the United Kingdom. S. R. & O., No. 1363.

The *Foreign Marriages (China) Order in Council*, 1938, excludes the solemnisation by a marriage officer in China of marriages of members of His Majesty's Naval and Military Forces and the Royal Air Force serving in China. S. R. & O., No. 1364.

CASE LAW

Though the point at issue in *Hall Brothers S.S. Co., Ltd.* v. *Young, The Trident*, 159 L. T. 89, was the construction Classification.

of an English insurance policy, the case contains an important judicial contribution to the theory of classification. The defendant was an underwriter of a Lloyd's marine insurance policy, containing the usual collision clause by which the insurer undertakes to pay the insured a defined part of what the insured becomes liable to pay to third persons "by way of damages" in respect of a collision. The plaintiffs' ship was being piloted into Dunkirk when a collision occurred between her and the French pilot-boat, and both ships were damaged. By French law a piloted ship has to compensate the pilot-vessel for all damage suffered during pilotage, unless due to the pilot's gross negligence, and, although the collision was not due to any negligence of the plaintiffs' ship, the plaintiffs were held by the French Courts to be liable to indemnify the pilot-boat. The plaintiffs claimed the amount so disbursed from the underwriter. The question was whether the moneys paid by the plaintiffs could be said to have been paid "by way of damages", and this question was answered in the negative by Goddard, J. In order to arrive at his decision the learned Judge had to classify the shipowners' absolute liability in favour of the pilot-boat as liability in tort, in contract, or by way of "statutory indemnity". Thus a French legal institution had to be fitted into the categories of English law, and the way in which the learned Judge solved this problem shows how the difficulties of classification of foreign rules into categories of the *lex fori* can be overcome. After having heard the evidence of French lawyers, the Judge first considered the meaning which French law gave to this rule, and the policy of law underlying this French legislation. He then looked for a similar institution in English law—found it in section 74 of the Harbours, Docks and Piers Clauses Act, 1847—and came to the conclusion that the liability under that statute would have to be regarded as either contractual or quasi-contractual, but that it was neither tortious nor quasi-delictual. The most interesting point was that the Judge refused to follow the opinion of the French lawyers who characterised this liability as based on quasi-delict. It was, of course, not a case of conflict of laws, but it may serve as a model for classification in "conflicts" cases, for the construction of an English insurance policy and that of an English rule of Private International Law are both matters of English law.

In this connection *Re Brownlie, Brownlie* v. *Muaux*,

[1938] 4 All E. R. 54, is also of interest. French terms of art used in a will made by a domiciled Englishwoman in French had to be fitted into the English system of life interests, entailed interests and absolute interests. Simonds, J., was even prepared to consider the question whether the language used "would have created an entailed interest in freehold land" before 1926 within the meaning of section 130 (2) of the Law of Property Act, 1925.

Jurisdiction. Foreign sovereign.

The case of *Compania Naviera Vascongado* v. *Steamship Cristina*, [1938] A. C. 485, gave the members of the House of Lords an opportunity of expressing opinions on some of the most fundamental problems of Public and Private International Law, but the decision itself does not solve many of them. The facts of the case are summarised in the *Annual Survey*, 1937, p. 385. The Spanish Consul, acting on behalf of the Republican Government, dismissed the captain, officers, and crew of the *Cristina* while she was lying in Cardiff docks, and, ever since, the new captain and crew exercised continuous possession for the Spanish Government. The House of Lords affirmed the judgment of the Court of Appeal setting aside the writ *in rem* and arrest of the ship obtained by her owner. The question, whether the requisitioning decree was capable of attaching property outside the territory of the requisitioning State, was not at issue. The decision exclusively turned on the jurisdiction of the English Courts to implead a foreign Government, and on the "immunity of a foreign sovereign". The conclusions at which the House arrived were as follows:—

(1) A clear distinction exists between the two principles on which a foreign sovereign can claim immunity from the jurisdiction of English Courts. The first is that the foreign sovereign cannot be sued in the Courts of this country without his consent, the second that property of which he is in possession or control cannot be attached or detained by order of a Court. This distinction is of considerable practical importance, for the first rule is "absolute", *i.e.*, it applies in whatever capacity the sovereign may be sued, and even though the alleged claim against him may have arisen from a purely commercial transaction. The operation of the second rule, however, is restricted, and it applies only if the property concerned is controlled or possessed by the sovereign "for public uses", "for public purposes", or "*publicis usibus destinatum*". On these points the learned Lords

agreed, but there was difference of opinion as to whether a writ *in rem* came under the first or only under the second rule. Lords Atkin, Thankerton and Wright thought that it directly impleaded the sovereign who claimed an interest in the ship, but Lord Maugham seemed to disagree. In the view of the majority of the House this concluded the case. As the writ was directed against the foreign Government, it had to be set aside, whatever was the nature of the property concerned. Lord Wright's speech contains an historical and juridical analysis of the writ *in rem* showing that, if admissible against a foreign sovereign, it would confront him with the alternative of either sacrificing his interest in the ship or his immunity from being impleaded.

(2) There was no agreement on the question as to what kind of interest in the property would bring the second rule into operation. Proof of ownership is sufficient, but not necessary, and ownership was not even claimed by the Spanish Government in the case before the House. A mere claim of ownership would, in Lord Maugham's opinion, not be sufficient, unless, perhaps, it was a case of "ships of war or other notoriously public vessels, or other public property belonging to the State". On the other hand, no more than *de facto* possession by the foreign sovereign is required, and such possession the Spanish Government was proved to exercise in the *Cristina*. Lord Wright did not think that a mere assertion of possession would have served the same purpose, but it was emphasised by various Lords that a proof of a right to possession was unnecessary and that it did not matter how possession had been obtained, provided that it was not done by a breach of the peace. In the opinion of Lord Wright the interest claimed by the foreign sovereign need not even be of a possessory character, and a requisitioned vessel, subject to the direction and employed under the control of the Government, is immune from detention and arrest though not in the Government's actual possession, a view to which Lord Maugham refused to accede. Lord Wright's conclusion was that the act of requisition itself, whether rightful or wrongful, gave a property-interest to the requisitioning Government which made the immunity rule applicable.

(3) It was agreed that the second rule applied in the case of the *Cristina* because the possession exercised was "possession for public uses", since the requisition had been expressly

decreed for purposes connected with the civil war. Thus the House avoided a decision of the question whether a vessel used for commercial purposes by a foreign Government was exempted from the jurisdiction of the Courts of this country. But though the eagerly awaited ruling on this point was not given, the learned Lords expressed opinions on this matter which cannot fail to exercise a profound influence on the development of the law in this country and abroad. Lord Maugham's speech is a vigorous condemnation of the "absurd" principle that a trading sovereign should not be subject to the same liabilities as any other trader, while Lord Wright favoured the opinion that this extension of the rule was a "logical evolution" and was the law in force, though it was open to "justifiable criticism". Lords Macmillan and Maugham laid stress on the change which the practical operation of this rule was bound to undergo in times when Government functions increasingly extended into the economic sphere, and they as well as Lord Thankerton were inclined to overrule decisions like *The Porto Alexandre*, [1920] P. 30, which had given effect to this principle. That the leading case, *The Parlement Belge* (1880), 5 P. D. 197, had left this matter open was agreed on all sides, and it was emphasised that so extraordinary a principle could claim application only if embodied in a universally recognised maxim of International Law, if it forms part of the "comity" of nations which, in connection with this topic, "whatever may be its defects in regard to other rules of Private International Law, has a very powerful significance".

The rule approved in *The Cristina* defeats claims of private persons with regard to objects under the control of a foreign Government. *The Arantzazu Mendi*, [1938] P. 233, on appeal, [1939] P. 37, and, in the House of Lords, [1939] 1 All E. R. 719, shows how the rule applies if the rival claims are both raised by foreign sovereigns. This was also a case of a Bilbao ship coming under the requisitioning decree of the Republican Government. In this case, however, the Republican Government took at first no steps to get possession of the ship, which was outside the Spanish waters at all material times. The owners themselves, by way of preventive action, issued a writ *in rem* for possession and arrested the ship, but these proceedings were afterwards discontinued. The arrest, however, remained in force because certain dues had not been paid, and throughout the subsequent proceed-

ings the ship remained in the custody of the Admiralty marshal. On March 2, 1938, the Nationalist Government requisitioned the ship by a decree specifically mentioning this vessel, and on April 5 notice of the decree was served on the master of the ship, who agreed to retain the ship at the disposal of the Nationalist authorities, and, shortly afterwards, the owners expressly submitted to the requisition and declared that they held possession of the ship on behalf of the Nationalist Government. Thereupon the Republican Government, which had served notice of its own decree in the meantime, issued a writ *in rem*, and the Nationalist Government now moved to set aside this writ. Thus a question of priority was raised. The case would have to be won by that Government which had first acquired an interest in the ship enabling itself to claim the immunity. Bucknill, J., found that the Nationalist Government had done all it could legally do to obtain possession and had in fact a limited possession through the submission by the master and the owners. He also thought that the Nationalist Government, being interested in the *res*, was in fact impleaded by the writ. The House of Lords agreed with these views of the learned Judge and held that the Nationalist Government was in fact in possession by virtue of the master's undertaking, and that the Admiralty marshal merely had the custody and not the possession of the ship. In the Court of Appeal, however, Slesser and Finlay, L.JJ., found that the marshal was in possession, but that through the requisitioning decree and the master's and owners' submission the Nationalist authorities had acquired "powers of the disposition and control of the ship" which exempted the ship from the jurisdiction. They thus followed Lord Wright's *dictum* in *The Cristina*, but they did not explain why the previous requisition by the Republican Government had not conferred a similar interest on that Government. It would seem that according to this view, in a case of conflicting claims, based on mere requisition, that Government can claim the immunity to which the owner first "attorns". All this assumed, of course, that the Nationalist authorities were a Government capable of claiming the immunity. Bucknill, J., obtained from the Foreign Secretary a statement that the Franco authorities were recognised as exercising *de facto* administrative control over the larger portion of Spain, including the Basque provinces, and that they were not subordinate to any

other Government in Spain. It was held by the learned Judge, who was affirmed by the Court of Appeal and the House of Lords, that *de facto* recognition as a sovereign enabled a foreign authority to plead the immunity though another Government was recognised by His Majesty as the *de jure* sovereign over the same area.

The extraordinary difficulties with which the Spanish civil war confronted the British authorities are further illustrated by *The Abodi Mendi*, [1939] 1 All E. R. 701. The Republican Government first issued a writ for possession and obtained an arrest of the ship, but afterwards gave notice of discontinuance of the action and issued a summons asking for the release of the ship. Before that summons was heard, the master, who was in sympathy with the owner and with Franco, was forcibly excluded by the Republican crew, who acted in agreement with the Republican Government. The Court of Appeal held that this constituted a contempt of Court on the part of the Republican authorities, who were the plaintiffs in the action, because it interfered with the custody of the ship exercised by the Court through the Admiralty marshal. The release of the ship was therefore made conditional upon the reinstatement of the displaced master. The case shows that a foreign sovereign can be made responsible for contempt of Court, at least in an action in which he is the plaintiff.

Whether an act of requisition is sufficient to give a foreign Government an interest in property enabling it to claim the immunity remains undecided, but that a mere claim to a proprietary right is insufficient was definitely established in *Haile Selassie* v. *Cable and Wireless, Ltd. (No. 1)*, [1938] Ch. 545, and on appeal, [1938] Ch. 889. Before the Italian conquest of Abyssinia the defendants, an English company, had contracted with the Emperor in his capacity as head of the Ethiopian State for the institution and working of a wireless service and had become indebted to him for a large amount. After the conquest of Abyssinia by Italy had been *de facto* recognised by the British Government, the Emperor, who was still the *de jure* sovereign of Ethiopia, claimed this sum from the defendants. The Italian Government also claimed the money, but refused to take part in any proceedings before the English Courts. The defendants argued that by virtue of his recognition as *de facto* sovereign of Ethiopia the King of Italy had acquired the right to claim the money,

but Bennett, J., declined to express an opinion on this question, and held that to decide the case on its merits would mean to implead the King of Italy. This decision was reversed by the Court of Appeal. The King of Italy was no party to the present proceedings so that the first of the two immunities distinguished in *The Cristina* did not operate. The mere fact that the chose in action forming the subject-matter of the dispute was claimed by a foreign sovereign did not preclude the Court from adjudicating upon the title. No "proved or admitted proprietary or possessory" right belonging to the King of Italy was at stake, and, as Greene, M.R., expressed it, "where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether the property belongs to the plaintiff or the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned". A foreign sovereign must establish his title to a chose in action before he can claim the immunity, for in this case there can be "no question of possession or control".

Foreign sovereign. *De facto* recognition.

It is well established that the internal relations and the constitution of a company are governed by the law of the country of its incorporation. *Banco de Bilbao* v. *Rey*, [1938] 2 K. B. 176, deals with a case in which the country of incorporation was split by civil war, two Governments being *de facto* in authority. In such a case the Anglo-Saxon theory of the law of incorporation as the proper law of the company's constitution breaks down and has to give way to the principle in force on the Continent that the law "prevailing at the place where the corporate home was set up" must govern the company as a legal entity. The plaintiff company had its "*domicilio social*" at Bilbao, and a branch in London, of which the defendants were managers. In 1936 the Basque country was proclaimed an autonomous region and the new Government made a decree purporting to amend the constitution of the Basque banks. The new board of the company sent an emissary to England to take over the London branch, and, when the defendants refused to give up control, he brought, on behalf of the plaintiff company, an action to restrain the defendants from continuing to control

the branch. That action was dismissed by Lewis, J., on the ground that the Basque decree from which the new board derived its authority was void according to Spanish constitutional law, and though the plaintiffs appealed against this judgment, they hardly contested the validity of the learned Judge's reasoning.[1] After the appeal had been lodged, Bilbao was taken by General Franco, and the Republican Government issued two decrees, subsequently ratified by the Cortes, by which all Basque companies were to be deemed to have transferred their domicil to Valencia or Barcelona, all the Basque decrees were retrospectively validated, and all shareholders' meetings of such companies taking place outside the Republican territory were declared invalid. Afterwards the Insurgent Government made a decree nullifying these orders of the Republican Government, and the shareholders of the plaintiff company held a meeting at Bilbao at which they repudiated the authority of the solicitors in the present case and ratified the acts of the defendants. The Court was informed by the Foreign Office that General Franco was recognised by the British Government as the *de facto* authority at Bilbao, and, on the principle which was subsequently upheld by the House of Lords in *The Arantzazu Mendi*, the acts of the recognised *de facto* authority could not "be impugned as the acts of a usurping Government", while those of the *de jure* Government, not being in *de facto* control of the company's corporate home, had to be treated as a mere nullity. The appeal was dismissed, but it was pointed out by Clauson, L.J., that a party contesting the authority of their opponents to act on behalf of a company appearing as plaintiffs should not defend the action, but apply for its being struck out or stayed.

The effect of *de facto* recognition was further elucidated by the judgment of Bennett, J., in *Haile Selassie* v. *Cable and Wireless, Ltd.* (*No. 2*), [1939] Ch. 182. When the Court of Appeal had remitted the case to Bennett, J., the learned Judge had to decide whether the *de facto* recognition of the Italian conquest of Ethiopia had deprived the *de jure* sovereign of his title to recover the debt which formed part of the public revenues of Ethiopia. It was held that the debt was still vested in the Emperor. The principle of succession to public property applies in a case of a change of *de jure* sovereignty, but not where the remaining *de jure* sovereign

[1] The judgment of Lewis, J., is only reported in French in 65 Clunet 602, with an interesting note by Dr. Elkin.

is deprived only of his *de facto* control. The recognition of *de facto* government extends to "acts in relation to persons or property in the territory which the authority is recognised as governing in fact", such as confiscations, and changes in the constitution of companies incorporated in the territory. It does not affect the title to property in another country such as the debt of an English company which remains vested in the *de jure* sovereign. When the case came before the Court of Appeal, the King of Italy had in the meantime been recognised by the British Government as the *de jure* sovereign of Ethiopia so that the case was ultimately decided against Haile Selassie, on the ground that the new *de jure* sovereign's right of succession had to be dated back to the time when *de facto* recognition had first taken place.

Contracts. Incorporation of foreign law.

In *Compania Naviera Bachi* v. *Henry Hosegood & Co., Ltd.*, 158 L. T. 356, Porter, J., held that the Spanish law and practice with regard to the payment of the crew were embodied in an English charterparty concerning a Spanish ship. In complying with Spanish law and practice the shipowners acted reasonably and without fault so that they were entitled to rely on the barratry clause in the charterparty when the Spanish crew, in order to get more than they were entitled to by Spanish law, attempted to prevent the discharging of the vessel in an English port. In *E. Timm & Son, Ltd.* v. *Northumbrian Shipping Co., Ltd.*, 158 L. T. 474, another example of incorporation of foreign law into an English contract, the Court of Appeal affirmed the decision mentioned in the *Annual Survey*, 1937, p. 327.

Foreign currency.

The decision of the Court of Appeal in *Rhokana Corporation, Ltd.* v. *Inland Revenue Commissioners*, reviewed in the *Annual Survey*, 1937, p. 330, was reversed by a majority of the House of Lords ([1938] A. C. 380), and it was held that income tax had to be deducted from the nominal sterling value of the interest warrants and not from the sterling amount being the equivalent of the sum in foreign currency obtained by the debenture-holder exercising his *option de change*. Lord Atkin was of the opinion that, as the tax to be deducted was in sterling, the payment from which deduction was to be made had of necessity to be a sterling payment as well. To calculate this sterling amount by reference to the rate of foreign exchange on the varying days of encashment would mean to force the company to render an account to the revenue authority for each separate payment, and

this would involve a breakdown of the machinery. Lord Thankerton held that "the primary obligation" of the company was to pay "interest in sterling, subject to British income tax, and that the option given to the debenture-holders to claim payment in foreign currency applies to the balance only after deduction of British income tax". This option was, in the words of Lord Maugham, a "superadded alternative right". Lord Russell of Killowen, in a dissenting judgment, agreed with the reasoning of the Court of Appeal. There is a *dictum* in Lord Atkin's speech that "there can be no debt in this country of an amount in foreign currency"; but this would seem to mean only that a foreign currency debt cannot be enforced *in specie*.

If a contract provides for payment in units of foreign currency, the meaning of the currency unit must be ascertained by the terms of the law of the country in the currency of which the obligation is expressed, not by the proper law of the contract. Whatever be the law of the obligation, it is for the law of the currency to define the foreign currency unit. This principle is well illustrated by the decision of the Privy Council in *Pyrmont, Ltd.* v. *Schott*, [1939] A. C. 145. The appellants, an investment company incorporated in Gibraltar, borrowed there from the respondent 500,000 Spanish pesetas, capital and interest being payable in that currency, though sterling was the only legal tender in Gibraltar. While one interest instalment and the capital payment were still outstanding, a decree came into force in Spain by which it was prohibited to introduce into Spain Spanish banknotes unless accompanied by a *guia*, or authorisation proving that an amount of peseta notes equal in value to those to be imported had been legally taken out of the country. Only notes to which such a *guia* was attached were exchangeable at the Bank of Spain for their nominal value in metal coins. The immediate result was that two types of notes, those with *guia* and those without, began to circulate in Gibraltar, the latter, of course, at a heavy discount. The Privy Council held that the word "peseta" meant the unit of account in the currency of Spain, that the appellants had contracted to supply 500,000 such units, and that "the obligation was to pay in whatever, at the date of repayment, was legal tender and legal currency in the foreign country whose money was lent". Peseta notes without *guias*, however, were no longer Spanish

units of account at the time of repayment. "The form in which such payment is to be made must be regulated by the municipal law of the country whose unit of account is in question". The obligation was, therefore, not discharged by a tender of notes without *guias*. Had the respondents given the loan in notes, and not, as they actually did, by furnishing a credit upon a bank which, after the decree, only dealt in notes with *guias*, it might have been a contract for the redelivery of peseta notes and not for the delivery of Spanish units of account, and the decision might have been different.

Proper law and place of performance.

The case of *New Brunswick Ry.* v. *British and French Trust Corporation*, reviewed in the *Annual Survey*, 1937, at p. 334, went up to the House of Lords, which ([1939] A. C. 1) affirmed the judgment of the Court of Appeal, so far as the capital payment was concerned, but held that on a proper construction of the bonds the gold clause did not extend to interest payments. That the *Feist* construction of the gold clause applied to the capital payments and that in the absence of special circumstances gold clauses of this kind must always be construed as value clauses, was the unanimous view of the Lords who gave judgment. The House did not solve the problem of the border line between "substance of the obligation" and "mode of performance" in currency matters. The Canadian statute which abrogated gold clauses was held to be inapplicable even if Canadian law was the proper law of the contract, and thus the question what was the proper law of these bonds remained undecided. In so far as that statute purported to affect the currency which could be tendered in discharge of the bonds it was immaterial, because (*per* Lord Russell of Killowen) after the repudiation of their obligation the appellants had become "incapable of tendering payment in satisfaction of their contractual obligation under these bonds. . . . They could only tender damages." Though the Act applied to matured obligations, it did not affect a repudiated obligation "for the fulfilment of which tender has become impossible". The Lord Chancellor thought that questions of the validity or form of tender were procedural matters for the *lex fori*, once the contract was before the Court, and that, in so far as the Act abrogated gold clauses, it was not retrospective. Indeed, he seemed to be inclined to hold that the retrospective diminution or destruction of the rights of English creditors

with regard to a debt payable in England would have violated English public policy. The main *ratio decidendi*, however, and, in particular, the basis of Lord Wright's judgment, was of a procedural character. On the day when Hilbery, J., should have given judgment for the creditors, their contractual rights should have been merged in the judgment and nothing which happened after that date could affect the measure of their claim. The change of law between trial and appeal should have been disregarded by the Court of Appeal. The only judgment to deal with the general currency problem was that of Lord Romer. He pointed out that English law as the *lex loci solutionis* regulated the discharge of the obligation. "In the case of a contract which is governed by English law, but which provides for its performance in a foreign country, a term is to be implied in the contract that such performance shall be regulated by the law of that country—that is, the *lex loci solutionis*—and, there being no evidence that Canadian law differs from our law in this respect, it is to be assumed that this rule prevails in Canada. If, therefore, Canadian law were the proper law of the contract, it would become necessary to ascertain whether the Canadian Act is one that affects the measure of the company's obligation or merely purports to affect the method in which those obligations are to be discharged." The only section of the Act, however, which dealt with the substance of the obligation was that abrogating gold clauses, and this the learned Lord held to have no retrospective effect. Lord Romer's *dictum* seems to imply that the rule which attracts the *lex loci solutionis* to the mode of performance is a rule of English municipal law and not a rule of Private International Law at all, for otherwise the reference to Canadian law would have been out of place, since the House of Lords as an English Court does not apply foreign Private International Law. The result would appear to be this: In the absence of a contractual term excluding the application of the rules prevailing in the *locus solutionis*, it is a rule of English municipal law that a debtor must discharge his obligation in the currency of the country of payment and that he may do so.

The decision of the Privy Council in *De Bueger* v. *J. Ballantyne & Co., Ltd.*, [1938] A. C. 452, belongs to the group of cases dealing with the determination of the currency in which an obligation is expressed. The respondents, a company incorporated in New Zealand with a branch office

in London, entered in London into an agreement with the appellant by which he was to be employed in New Zealand for three years at a remuneration of "£700 sterling per annum". The question was whether he was entitled "to be paid according to the English or to the New Zealand value of a pound". The appellant did not claim English bank-notes or other means of payment, but "such amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange at the time of each payment", and what was at issue was clearly not the *quid* but the *quantum* of the discharge. The Judicial Committee, reversing a majority decision of the Court of Appeal of New Zealand, found for the appellant. Lord Wright, who delivered judgment, regarded the question as one of the construction of the agreement. He was apparently inclined to regard English law as the system presumably contemplated by the parties as the proper law of the contract, and he applied the principle embodied in the *Adelaide* decision. The majority of the New Zealand Court of Appeal had based their judgments on the identity of the English and New Zealand pound as "units of account" and "moneys of account" which, so they thought, was established by the *Adelaide Case*. Lord Wright, however, objected to the interchangeable use of these two terms, one of which connotes a denomination while the other one refers to a currency. He pointed out that, according to the *Adelaide* decision, the two "pounds" were "identical only in name and as a matter of words", *i.e.*, as units of account, but different as means of discharge, *i.e.*, as actual currency. In view of this identity of the units of account the parties in the present case had added the word "sterling", "in order to define what means of discharge,—that is what currency,—was stipulated". Had this not been done "the salary would have been payable in New Zealand currency, that being the place of payment", but the word "sterling" excluded "the *prima facie* rule according to which New Zealand pounds would be meant, as being the currency of the place of payment". This decision shows that an obligation is to be measured in the terms of the currency of the place of payment, but that this is a rule of construction only which is readily displaced by a contrary intention of the parties. It is, therefore, no principle of Private International Law which attracts to this question the

system of law prevailing in the country where the obligation is to be performed.

Gold clause.

Sturge v. *Excess Insurance Co., Ltd.*, 159 L. T. 606, was an aftermath of the gold clause controversy. English indemnity insurance policies covering the risk of non-payment of Canadian bonds did not mention the gold clause contained in the bonds themselves. Capital and interest on the bonds was paid in paper dollars, and the insured bondholders argued that the gold clause had to be read into the policies and that they were covered against non-payment according to the *Feist* construction of the gold clause, a contention which was rejected by Branson, J.

Transfer of intangible movables.

The decision in *Finska Angfartygs A.B. and others* v. *Baring Brothers & Co., Ltd.*, reviewed in the *Annual Survey*, 1937, p. 324, was affirmed by the Court of Appeal: 61 Ll. L. R. 257. Even new evidence adduced by leave of the Court could not convince the Court of Appeal that there had been an assignment to the plaintiffs of the funds lodged with the defendants. But even if the alleged agreement had been proved, the appeal would have been dismissed, "since the agreement alleged would not in our judgment have amounted to an effective assignment under Russian law". In view of the decisions on the facts, this may be a mere *dictum*, yet it seems to imply that the Court of Appeal had no objection to the interpretation given to the *Guatemala Case* by Luxmoore, J.

Nullity of marriage.

In *Hussein* v. *Hussein*, [1938] P. 159, a girl domiciled in England went through a ceremony of marriage in England with a domiciled Egyptian. She alleged that he had forced her to do so by threats to kill her if she did not marry him. She brought a nullity petition before Henn Collins, J., and a nullity decree was made on the ground of duress according to English law. The decision shows again that the English Court has jurisdiction to pronounce a nullity decree if the marriage was celebrated in England, irrespective of the husband's domicil at the time of the marriage and of the petition. The validity of the consent itself is governed by the *lex loci celebrationis* and not by the *lex domicilii*. This had already been held in cases turning on fundamental mistake, but not so far in a case in which duress was alleged. It must be contrasted with the principle that in other respects, such as capacity, the essential validity of the marriage is governed by the *lex domicilii*.

Family maintenance claims.

Authorities on the Private International Law side of family maintenance are few and far between, but the current year brought an important contribution to this subject. In *Simons* v. *Simons*, 159 L. T. 576, the husband was a domiciled Englishman who went to Boston in 1912 and was there joined by his wife and children in 1923. In 1924 the wife obtained a divorce decree from the Court of Massachusetts, coupled with an order for payment at the rate of $14 per week for the benefit of herself and the infant children. Two years later the husband returned to England and ceased to comply with the maintenance order. In 1938 the wife tried to enforce the Massachusetts order in this country. It appeared, however, that the husband had never acquired a domicil in the United States. The plaintiff was unable to discharge the heavy burden of proof imposed on a party alleging the acquisition of a domicil of choice, and, moreover, Goddard, L.J., accepted as evidence the defendant's own declaration that he never intended to make Boston his permanent home. The divorce decree was, therefore, a nullity, but the question arose whether its invalidity affected the maintenance order. The plaintiff argued that, as the order was a judgment *in personam*, the Massachusetts Court had jurisdiction to make it, since the defendant had been present in Massachusetts at the time of the commencement of the proceedings and had also submitted to the jurisdiction. In this connection, however, the fact was of importance that the Massachusetts Court itself assumed divorce jurisdiction only on the ground of domicil and that it had made the divorce decree as well as the maintenance order on a false assumption. The nullity of the divorce decree according to the Court's own law made the maintenance order ineffective. Moreover, and for this proposition *Papadopoulos* v. *Papadopoulos*, [1930] P. 55, was an indirect authority, an English Court does not enforce a maintenance order which is "ancillary" to a divorce or nullity decree, unless that decree was made by a Court having jurisdiction according to English Private International Law. The rules applicable to the jurisdiction of foreign Courts to give ordinary judgments *in personam* do not apply to maintenance orders. A minor point of interest was that the learned Judge admitted a member of the New York bar as an expert witness on the law of Massachusetts.

Wills.

Re Cartwright, *Cartwright* v. *Smith*, [1939] Ch. 90, is

a strong reminder that, in spite of the Administration of Estates Act, 1925, the difference between real and personal property is still very much alive in view of the provisions of Lord Kingsdown's Act. A domiciled Englishman purported to dispose by a will made in France of the ultimate remainder in the proceeds of English settled freehold land sold by himself as tenant for life. The will, which complied with the forms of French law, but not with the Wills Act, 1837, was formally valid under Lord Kingsdown's Act, if the interest disposed of was personal property, but invalid if it was realty. Bennett, J., thought that section 75 (5) of the Settled Land Act, 1925, had become inoperative and that the proceeds of settled freehold land were no longer to be regarded as converted into real estate, because under the Administration of Estates Act, 1925, the devolution of real estate was now the same as that of personalty. His decision was, however, reversed by the Court of Appeal. The Master of the Rolls pointed out that the distinction between real and personal estate continued to exist, and that under the Settled Land Act the proceeds of a sale of settled land were converted into land to be treated exactly like the settled land which had been sold. Proceeds of settled freehold land were, therefore, realty and incapable of being disposed of by a will deriving its validity only from Lord Kingsdown's Act. It had been argued that the testator had been entitled to effect a re-conversion into personalty and that the French will itself was one of the acts indicating an intention to do so. But in order to be personal estate within the meaning of Lord Kingsdown's Act property must be personalty apart from the will itself. "You cannot acquire, by virtue of the very will you are seeking to validate under that Act, the quality of personal estate which the Act requires before the will can be valid."

Service out of the jurisdiction.

A plaintiff who has obtained leave to serve a writ out of the jurisdiction cannot afterwards add in his statement of claim a cause of action for which leave to serve the writ abroad could not have been granted. This was laid down by the Court of Appeal in *Waterhouse* v. *Reid*, [1938] 1 K. B. 743. The plaintiff had served on the defendant abroad a writ by which he claimed damages for fraudulent misrepresentation committed in England, *i.e.*, in tort, but by the statement of claim he also asked for damages on the ground of breach of warranty, *i.e.*, for breach of a contract made

and broken in England. As the defendant was domiciled in Scotland no leave could have been granted to serve abroad a writ for breach of contract. It was held, therefore, that the claim for damages for breach of warranty had to be struck out from the statement of claim. Any other decision would have defeated the object of Order 11.

It is provided in the Crown Suits Act, 1865, s. 37, that in a suit on the revenue side of the Court a writ of subpœna may be served on a British subject outside the United Kingdom without leave of the Court. On being satisfied of certain matters, *e.g.*, that a reasonable effort was made to effect personal service, the Court may then order the informant to proceed with the case and may give judgment by default if the informant proves the merits of his case. In *Att.-Gen.* v. *Prossor*, [1938] 2 K. B. 531, it was held by the Court of Appeal that this provision is still in force and was not repealed by an amendment of R. S. C., Order 68, introduced in 1932, which made Order 11 applicable to proceedings on the revenue side. The Crown may still sue out and serve the writ of subpœna on a British subject abroad without making the previous application to the Court for leave which in ordinary proceedings is required by Order 11. The amendment of Order 68 only extended to revenue proceedings the effect of Order 11, Rule 11, dealing with cases where conventions with foreign countries have been made with respect to service.

"The practice in regard to writs, and the requirements of the law in regard to the service of writs, are, and have always been, regarded as matters *strictissimi juris*". This is also true of the service of a bankruptcy petition abroad ordered by the Court under Bankruptcy Rules. In *Re A Debtor* (*No. 441 of 1938*), [1939] Ch. 251, an order was made giving liberty to serve a sealed copy of the petition, together with a sealed copy of the order, personally on the debtor. It was proved that a sealed envelope addressed to the debtor and containing the petition and the order, but bearing on the outside no reference to its contents, had been handed to the debtor. This was held by the Court of Appeal to be bad service, because there was no proof that the documents had been brought to the personal knowledge of the debtor. From the mere facts that the envelope had been addressed to the debtor and that it had been opened no inference could be drawn that the documents had come into the hand of the

debtor in such a manner that their nature was brought to his mind.

Foreign judgments.

The decision in *Yukon Consolidated Gold Corporation, Ltd.* v. *Clark*, reviewed in the *Annual Survey*, 1937, p. 337, was affirmed by the Court of Appeal: [1938] 2 K. B. 241. The difference between the "application" of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, to the Dominions by the Order in Council of 1933, and the "extension" of the registration machinery to an individual Dominion by a further Order, was emphasised by all the members of the Court. Slesser, L.J., pointed out that this difference also existed under the Act of 1920, which had to be "applied" by Order in Council to protectorates and mandated territories, before its effect could be "extended" to any of them by a second Order. In the same way the 1933 Order merely "put the Dominions in the same position with regard to their judgments as that in which they would have been had they been foreign judgments". The judgment of Greer, L.J., contains an interesting historical analysis of the statutory rules referring to the recognition of foreign judgments and a suggestion that the effect of the Act can only be extended to judgments of the "superior" Courts of the Dominions.

The first case decided under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, *Re A Judgment Debtor (No. 2176 of 1938)*, 160 L. T. 92, raised what the Master of the Rolls described as "a question of importance, but . . . presenting no real difficulty". It was held that a bankruptcy notice can be issued on a judgment registered under the Act, and a notice issued on a registered judgment of a French Court was upheld by the Court of Appeal. It had been decided under the Judgments Extension Act, 1868, that Scottish and Irish judgments registered under that Act could only be enforced by execution, including equitable execution, but not in bankruptcy, and that in order to issue a bankruptcy notice on such a judgment in England, the judgment creditor had to bring an action on the judgment. These decisions, however, were based on words in the statute limiting the enforcement of a registered judgment to "execution". A similar restriction is contained in the Administration of Justice Act, 1920, with reference to registered Dominion judgments, but the Act of 1933 omits the

restricting words and provides in section 2 (2) that "proceedings" may be taken on a registered judgment as if it had been given by the registering Court, and this must be held to include bankruptcy proceedings. Moreover, under the 1868 and 1920 Acts a judgment creditor is at liberty to bring an action on the judgment, but this possibility is expressly excluded in the case of a judgment capable of being registered under the 1933 Act. To hold that a judgment creditor could not issue a bankruptcy notice on a judgment registered under the Act of 1933 would, therefore, mean to deprive him entirely of the right to use the foreign judgment in bankruptcy, and the result would be that the Act, made in order to facilitate the enforcement of foreign judgments, would have altogether destroyed the creditor's right of using the foreign judgment for bankruptcy purposes, which he previously possessed.[2]

LITERATURE

Books

Private International Law. By G. C. Cheshire. 1938. Second edition. Oxford: Clarendon Press. 692 pp. 25s.

The publication of a second edition of the leading textbook was the most important literary event of the year. It is, in fact, very largely a new book, and much more systematically arranged than the first edition. The three general problems of Classification, Renvoi and Public Policy are now in their proper places, and the general part of the book gives the student a complete survey of the fundamental questions which engage the minds of jurists working in this field, while at the same time the English case material is fully analysed, in so far as it can be said to deal with these general topics. The problem known on the Continent as that of the "preliminary question" is not treated separately and this might be done with great advantage in later editions. Nobody can fail to appreciate the conciseness and clarity with which Dr. Cheshire introduces the English student into the intricate questions of renvoi and classification, though not every reader will be prepared to accept the author's distinc-

[2] *Deutsche Bank und Disconto-Gesellschaft* v. *Banque des Marchands de Moscou*, 158 L. T. 364, was a case decided in 1932, reported in the current year. Attention is drawn to the very important *dicta* in the judgment of Scrutton, L.J.

tion of primary and secondary classifications. Dr. Cheshire has now "crossed the floor" and joined the camp of those who are opposed to renvoi in any form. His arguments are convincing enough, but there remains a lingering doubt whether the Courts of any country will ever see their way to throw overboard a theory which ultimately permits them to apply their own law in many cases. The arrangement has also been improved in other respects. Thus, the principle of *lis alibi pendens* is now to be found where one would look for it, though one still misses a general discussion of the *forum conveniens* rule, apart from its application to *lis alibi pendens*. Dr. Cheshire has given up his opposition to the conception of fraud as applied by the Courts in connection with the enforcement of foreign judgments. This is to be welcomed, because a book primarily intended for students was perhaps not the right place to develop this argument, though one feels that it has lost nothing of its strength. Even those not particularly interested in private international law should make themselves familiar with the highly interesting distinction made by the author between measure of damages and remoteness of damage. It is possible that private international law will here pave the way towards a clarification of conceptions used in the law of contracts and torts. It is hardly necessary to say that the recent cases and articles are fully discussed, though one might have wished for a more exhaustive treatment of the Matrimonial Causes Act, 1937, and of currency problems, other than the gold clause question.

It is not impossible that the publication of Dr. Cheshire's book will come to be regarded as a turning point in the history of English Private International Law. It coincides with a change in the judicial approach towards the conflict of laws. A body of general rules is beginning to develop in this field, and Dr. Cheshire's book is an admirable instrument in the hands of those who wish to assist in this process. They will find this second edition even more useful than the first.

Règles Générales des Conflits de Lois. By D. J. Llewelyn Davies. Paris: Sirey. 1938. 126 pp.

Mr. Llewelyn Davies' course of lectures at the Academy of International Law should be welcomed by Continental students of Anglo-American Private International Law and by English and American students of the Continental systems. The book consists of two principal parts, one containing a survey of the

general conceptions of comity and vested rights and of the main schools of thought prevalent in this country and in the United States: the territorial and the realistic school, the method of Dicey and that of Cheshire. The second part might have been entitled, "How English and American Courts and lawyers have used the general ideas of Continental private international law". It deals with classification and *renvoi*, *ordre public* and *fraude à la loi*, the latter conception being conspicuous by its absence in English law. The author is critical of the renvoi doctrine and favours a judicious compromise on the classification question, consisting in the application of the categories embodied in the Private International Law of the *forum* (not necessarily identical with those of its municipal law), tempered by a functional analysis of the foreign institution which has to be classified. The book is very valuable as a help towards bridging the gulf which still separates the work of Anglo-Saxon lawyers and jurists from that of their *confrères* on the Continent.

Les Conflits des Lois en Matière de Contrats dans le Droit des Etats Unis d'Amérique et le Droit Anglais comparés au Droit Français. Par Jean-P. Barbey. Paris: Rousseau. 1938. 359 pp.

When a French jurist trained in American law sets out to write a comparative analysis of the Private International Laws of the United States, England and France the results are bound to be illuminating. M. Barbey does not disappoint the hopes evoked by the title of his book. His treatment of English law is admirable so that the book can be recommended to advanced English students capable of reading a French text. The author gives a fairly complete survey of the English case law on capacity to contract and on the form and substance of contracts. In his opinion the English conflicts rules with regard to capacity went through an historical development consisting of three stages. During the first stage capacity was not properly distinguished from form and held to be governed by the *lex loci celebrationis* or *lex loci contractus*. By 1860 it began to be realised that the *lex domicilii* should regulate capacity, and *Brook* v. *Brook* can be said to be the beginning of this second stage. It lasted till 1908, when *Ogden* v. *Ogden* inaugurated a reversion to the *lex loci contractus*. Similarly, in regard to form the rule *locus regit actum* underwent an historical evolution, *Van Grutten* v. *Digby* marking the

transition from the imperative to the permissive interpretation of the rule. Two lines of thought which permeate the whole book show the particular value of the comparative method used by the author. By contrasting English and American with French law he is able to demonstrate that even the conflict of laws has been influenced by the jury system which forced the Courts to adopt an "objective method" and to avoid psychological inquiries. The definition of the proper law as the system with which the contract has the most real connection can be traced back to this objective spirit of the common law. On the other hand, a comparison of the English and French systems with American law shows that American conflicts rules have been evolved primarily in order to solve inter-State cases, while in Europe the international case was the typical situation necessitating the development of this branch of the law. This fact explains most of the differences between American and European law. It is interesting to note that in most respects the author favours the assimilation of French to English law. He regards English law with its "*casuistique expérimentelle*" as the best balanced of the three systems.

The Legal Aspect of Money. With special reference to Comparative and Private International Law. By F. A. Mann. London: Oxford University Press. 330 pp. 21s.

The abandonment of the gold standard in most countries, the inflation of many currencies, and the introduction of monetary restrictions in a large sector of Europe and America, have brought it home to the legal profession that there is such a thing as a "law of money". The stability of most currencies in the nineteenth century and down to the War deprived this branch of the law of its topical interest, at least in this country, and lawyers forgot about its existence. Now even a superficial glance at the Law Reports shows the considerable practical importance of monetary questions, and no year passes without its crop of currency cases. It had thus become urgently necessary that the legal aspect of money should at last be analysed in a systematic way, and Dr. Mann has done pioneer work in undertaking this task. The difficulties confronting the writer of a book of this kind are formidable. The English authorities are still relatively scanty, and, in order to give illustrations of many of the problems

discussed, the author had to resort to the enormous mass of case law existing in the United States and on the Continent. Yet, he never succumbs to the danger of being overwhelmed by his material. In spite of the ample use made of foreign sources the book remains throughout what it set out to be, a treatise on English monetary law, and the foreign illustrations are always subservient to this main purpose of the book. Questions of monetary law are not primarily matters of Private International Law. In order to expound the municipal as well as the private international law aspect of a foreign money obligation, the author has to give them their proper background. He, therefore, gives in the first part of his book an exhaustive analysis of the purely domestic legal problems of money, *i.e.*, of the conception of money, the organisation and incidents of the monetary system, of monetary obligations in general and the fundamental principle of nominalism in particular, and of the gold clause and other methods of negativing the effects of nominalism. The explanation of the unit of account and its organisation, the discussion of what constitutes a monetary system in the legal sense, and the convincing defence of the nominalistic principle are particularly valuable. In the second part, in which he deals with foreign money obligations, the author was well advised not to divorce the conflicts rules from the municipal law. This might have been a logical way of presenting the subject, but it would have impaired the practical utility of the book. After having discussed the general legal nature of such obligations in English law (payment or delivery of a commodity), the author explains the vital distinction between money of account and money of payment and introduces the English reader into the secret science of the various types of "options" and other protective clauses. The chapter on the determination of the money of account and the analysis of the *Adelaide Case* are the focal points of the whole book. Other chapters expound the nominalistic principle with regard to foreign money obligations and the Private International Law side of the gold clause and of the revalorisation problem, the payment of foreign money obligations and the international effect of currency restrictions, and the effect of the institution of legal proceedings on foreign money obligations, a topic which obtains its proper place at the end, and not at the beginning of the book. Three unpublished decisions of practical interest are printed in the Appendix to this valuable monograph.

Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth. By Horace Emerson Read. 1938. Cambridge (Mass.): Harvard University Press. London: Humphrey Milford. 371 pp. 17s.

It is not always realised by those interested in English Private International Law that a wealth of case material is available in the Reports of the Common Law Dominions. We must be grateful to Professor Read for having made part of this material easily accessible and for having undertaken this systematic study of an important branch of Private International Law as applied in England, Ireland, Canada, Australia, New Zealand and Newfoundland. It is the most exhaustive treatise on the recognition and enforcement of foreign judgments which has appeared in the English speaking world since Piggott published his famous book. The author deals in three books with the legal nature of a foreign judgment, the jurisdiction of foreign Courts, and the enforcement of foreign judgments. The very difficult question as to when a judgment is "foreign" is discussed in the first chapter. In order to answer it, the author has to embark upon a careful analysis of the constitution of the Courts in the federal Dominions. Only such analysis was able to supply a solution of the intricate problem to what extent decisions of the Australian High Court and the Canadian Supreme Court must be treated as foreign judgments in the Courts of the Australian States and in those of the Canadian Provinces. The author then explains the Common Law basis of the recognition of foreign judgments in the British Commonwealth and disposes of the "comity" concept exploded by the obligation theory which is embodied in *Godard* v. *Gray*. The foreign judgment is recognised because it creates rights and duties, not because it is an "implied" obligation in the nature of a quasi contract. In a most stimulating passage Professor Read demonstrates how this idea of the implied obligation originated as a procedural device in order to make the action of assumpsit available for the enforcement of the foreign judgment. As assumpsit would not lie on a contract of record, the notion crept in that the foreign judgment was merely *prima facie* evidence, and incapable of merging the cause of action. The non-merger rule is an historical anomaly and inconsistent with the principle of conclusiveness which demands that the foreign judgment should bind the successful plaintiff as it binds the unsuccessful plaintiff and the

unsuccessful defendant. The second book is a closely reasoned analysis of the jurisdiction rules as applied in England and the Common Law Dominions. The author is rightly critical of *Harris* v. *Taylor*, and of the fiction that corporations have a "residence" though the notion of "carrying on business" would fulfil the same purpose. His observations on the *Moçambique Case* show that in its application to actions *in personam* it can easily lead to a denial of justice. The chapter on marital status (containing a vigorous condemnation of *Att.-Gen. for Alberta* v. *Cook*) is particularly valuable, though the English Matrimonial Causes Act, 1937, came too late to be discussed in the book. English readers will be interested to find that *Abouloff* v. *Oppenheimer* was not followed by the Canadian Courts. The book concludes with a survey of the statutes facilitating the enforcement of foreign judgments.

Articles

Interstate Comity and Governmental Claims. By F. A. Daum. 33 *Illinois Law Review* 249. This is an interesting contribution to the doctrine that the revenue laws of one country are not enforced in the Courts of another.

A Note on Status. By J. G. Starke. *Law Quarterly Review*, 1938, p. 400. The author draws a distinction between personal and positive status and tries to utilise it for the purposes of private international law.

Renvoi Revisited. By Erwin N. Griswold. 51 *Harvard Law Review*, p. 1165. In view of the formidable array of the enemies of renvoi the author seems almost to be fighting for a lost cause in defending it, and he deserves our sympathy on this ground even where he fails to convince us. He favours the double renvoi doctrine and thinks that "when a Court is referred by its own conflicts rules to a foreign law, it should, as a matter of course, look to the entire foreign law as the foreign Court would administer it". He is aware that this cannot be "a theory for universal application", but he thinks "that by approaching the matter from the abstract and theoretical point of view, the fear of the endless chain has been magnified into a generalisation; while the endless chain is in fact and in practice an extremely rare apparition". The author seeks to revive Westlake's

désistement theory by recommending that in such a case the *lex fori* should be applied.

Considerazioni sul Rinvio in Diritto Inglese. By Rodolfo De Nova. *Rivista di Diritto Internazionale,* 1938, p. 388. This is a very able survey of the present state of the renvoi problem in this country. The author coins the happy phrase that the principle of *Re Ross* forces the English Judge "to impersonate the foreign Judge".

What amounts to "Carrying on Business" by a Foreign Corporation. By A. Farnsworth. *Journal of Comparative Legislation,* 1938, p. 183. Whether a corporation incorporated abroad is doing business within the jurisdiction is of importance for the purposes of income tax law as well as of civil procedure. The author examines and compares the cases decided in this country and in the United States. A foreign company is deemed to carry on a trade within the jurisdiction if it habitually enters into contracts in this country for the sale of goods, rendering of services, etc. The gist of the matter in regard to jurisdiction is whether that business is carried on through a dependent or an independent agent.

Corporate Nationality and the Neutrality Law. By Paul Weidenbaum. 86 *Michigan Law Review* 881. The article contains a discussion of the English cases on the nationality of corporations, and of the *Daimler Case* in particular.

"Contracts" and the Conflict of Laws: "Intention" of the Parties. By Walter Wheeler Cook. 82 *Illinois Law Review* 899. The author defends the "proper law" principle against Professor Beale and the Re-statement. Though this is convincing, it is difficult to agree with Professor Cook's view that reference to a foreign system of law is identical with the incorporation of its terms into the contract. If that were correct, how could the parties be bound by a subsequent change in the law of the country to the system of which they have submitted their contract? The article is particularly valuable for its attack on the alleged principle that a contract governed by a law other than that of the place of its making is void in so far as it infringes any rules of the country where it is made.

The Interpretation and Application of Municipal Law by the Permanent Court of International Justice. By C. Wilfred Jenks. 19 *British Year Book of International Law,* p. 67.

The article contains interesting remarks on the conflicts rules applied by the Court, especially in relation to contracts.

Foreign Exchange Restrictions. Anonymous Note in *47 Yale Law Journal*, p. 451. This is a summary of the problems arising in connection with currency restrictions. It contains valuable remarks on public policy.

Agency in Private International Law. By Walter Breslauer. *50 Juridical Review*, p. 282. The author examines the question which law is applicable to the relationship between principal and agent, and to the agent's authority in relation to third parties. An exhaustive review of the English and Scottish cases (with occasional sidelights on American and Continental law) leads him to the conclusion that, as between principal and third party, the agent's authority is governed by the proper law of the contract with the third party, provided that under the law governing the contract between principal and agent the latter was actually or apparently authorised "to act for his principal in such a way as to create international obligations". This would seem to be a sound principle, though it is doubtful whether the author is right in applying it to acts done by directors on behalf of a company. The *Risdon Iron Case* would not appear to yield this principle.

Law Governing Title to Intangibles. By Edward S. Stimson. *55 New York Law Quarterly Review*, p. 586. This is an analysis of the questions arising out of the confiscation of intangible movables.

Conflicts of Jurisdiction in Matrimonial Suits. By H. C. Gutteridge. 19 *British Year Book of International Law*, p. 19. Professor Gutteridge discusses "one of the most delicate and difficult problems to be found in the whole range of Private International Law", that of the unification of the rules governing the jurisdiction in matters of divorce and judicial separation. The problem is, of course, interwoven with that of the choice of the law applicable to matrimonial causes, because from the parties' point of view it matters little whether a Court declines to dissolve a marriage for want of jurisdiction or on the ground that the marriage tie is indissoluble under some law other than the *lex fori*. The article contains a review of the attempts at unification made in the past and shows to what extent and why they failed. In the light of the experience made with the Hague Convention of

1902 the author then proceeds to make practical suggestions for unification, *i.e.*, to find a smallest common denominator between the domicil and the nationality systems. Professor Gutteridge proposes that the Courts of the nationality and those of the domicil should have concurrent jurisdiction to adjudicate according to the *lex fori*, that domicil should be defined in this context as habitual residence, and that where the nationalities and/or domicils of the spouses are different, the Courts of the last common domicil and of the last common nationality should both be competent.

Capacity to make a Marriage Settlement Contract in English Private International Law. By J. H. C. Morris. *Law Quarterly Review*, 1938, p. 78. This is an attack on the "crude proposition" that capacity to make a marriage settlement depends on the *lex domicilii* of the contracting party at the date of the contract. The author shows that *Cooper* v. *Cooper* has been misunderstood and arrives at the conclusion that the proper law of the marriage settlement is the system governing this question. In the absence of special circumstances the law of the matrimonial domicil is presumed to be the proper law. "But if any of the possible proper laws contains a rule which does not decide once and for all that the contract is valid or void, but postpones deciding this question until a fixed time or a reasonable time after majority has expired, then the effect of all the domiciliary laws to which the *propositus* is subject between the making of the contract and the alleged repudiation must be considered in its turn."

Matrimonial Domicil and the Contract of Marriage. By Ronald H. Graveson. *Journal of Comparative Legislation*, 1938, p. 55. The matrimonial domicil is "not necessarily (that) of either of the parties but one conditioned upon the future performance of a marriage ceremony, a domicil of hope, of desire, of sincere intention, a domicil of the uncertain future . . . unknown to the Common Law . . . introduced and sponsored by the Civil Law". The author shows that it is derived from an application of the "place of performance" and "proper law" concepts to the contract of marriage, and that the word "domicil" is in fact a misnomer in this connection. The term is of greater importance in America than in this country, where it is mainly used to connote the law which "determines the rights of the parties

in the . . . property of each other", but has "no meaning whatever for the Divorce Court". In connection with the effect of marriage on property the law of the matrimonial domicil is in fact the proper law of the marriage settlement.

Le Régime des Successions applicable aux Etrangers domiciliés en Angleterre. By F. Honig. *Clunet*, 1988, p. 5. This is a survey of several aspects of English Private International Law with regard to succession, including a discussion of some points of matrimonial law.

The Recognition of Native Law and Custom in British Africa. By Julius Lewin. *Journal of Comparative Legislation*, 1988, p. 16. This article draws the attention of English lawyers to the numerous and important conflicts between European law and native custom which arise in the African colonies and in the Union of South Africa.

The Immunities of Foreign States in Private Transactions. By S. H. Brookfield. *Journal of Comparative Legislation*, 1988, p. 1. The subject-matter of this article is of great topical interest. The author discusses the immunity of foreign States (which he distinguishes from that of "sovereigns") in relation to the inception of suits, mesne process, and the enforcement of judgments. He shows to what extent "submission" is required by the laws of various countries and to what extent "implied" submission is accepted as sufficient. Counterclaims against foreign States and executions against their property are analysed in detail.

Immunity of the Subordinate Personnel of a Diplomatic Mission. By S. H. Brookfield. 19 *British Year Book of International Law*, p. 151. This is an analysis of *Engelke* v. *Musman*, and an examination "of the existing law as laid down in cases earlier than *Engelke* v. *Musman*, and as deducible from the practice of the Foreign Office, with a view to establishing what this basis is and to stating what appears to be the doctrine of certain other countries".

Foreign Investment and Extraterritorial Taxation. By Harold Wurzel. 38 *Columbia Law Review*, p. 809. Though not strictly within the scope of Private International Law, this article must be mentioned here because of the close contact existing between questions of international taxation and those of the choice of law.

PUBLIC INTERNATIONAL LAW

CASE LAW

The disturbed state of the world in 1938 has given the Courts more than the usual number of problems raising issues of international law, particularly those concerned with the meaning of "recognition". In a group of cases arising out of the Italo-Ethiopian war and the Spanish civil war there has been one common feature. In each case the Foreign Office has informed the Court that Great Britain recognises A as the "*de jure* government" and B as the "*de facto* government" of the territory concerned, but has left it to the Court to elucidate the legal meaning of this distinction.

In *Banco de Bilbao* v. *Sancha and Rey*, [1938] 2 K. B. 176, the substantial question was to determine whether the Republican or the Nationalist government was entitled to control the London branch of the plaintiff bank. The material facts of the situation changed between the trial of the action and the appeal. At the trial before Lewis, J., in June, 1937, a board appointed by a decree of the Basque government was seeking to oust the two London managers. Lewis, J., dismissed the action on the ground that the Basque decree had no legal validity under Spanish law. When the case came to be heard on appeal (February, 1938) General Franco was in control at Bilbao, but the Republican government at Valencia had issued a decree validating all the decrees of the Basque government and purporting to transfer the management of the Bank to Republican territory. It need hardly be added that General Franco had also issued a decree nullifying the decrees of his opponents.

The substance of the decision is contained in the following words of Clauson, L.J.: "This Court is bound to treat the acts of the government which His Majesty's Government recognise as the *de facto* government of the area in question as acts which cannot be impugned as the acts of an usurping government; and, conversely, the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognised by His Majesty's Government as the *de jure* government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's Courts."

Substantially the same issue came up for decision in the case of the *Arantzazu Mendi*, [1938] P. 233, and [1939] P. 37, which was a dispute between the two Spanish governments for the possession of a Bilbao ship in British waters. The Nationalists had issued a decree requisitioning the vessel, and the owners declared that they held her at the disposal of the Nationalist government. In answer to a writ for possession issued by the Republican government, which had been followed by an arrest, the Nationalists moved to have the writ and the arrest set aside.

The Court of Appeal, affirming the decision of Bucknill, J., accepted the Nationalist contention. The decision rested upon the ground that Spain was in fact divided between two governments, each of these being supreme within the territory which it controlled. "If the Secretary of State informs the Court", said Goddard, L.J., "that the Nationalist government had absolute independence of any superior authority, he informs the Court that they are *de facto* the sovereign State over that part of Spain." The House of Lords had already decided in the case of *The Cristina*, [1938] A. C. 485, that a writ for possession could not be served on the Republican government, and the effect of the decision in the *Arantzazu Mendi* is to place the Nationalist government, in so far as our Courts are concerned, upon a level of absolute equality with that of its opponent.[1]

In the case of *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] A. C. 485, the House of Lords affirmed the decision reported in the Courts below under the name of *The Cristina*. The decision of the Court of Appeal has been commented upon in the 1937 volume of the *Annual Survey* (p. 358). The only additional matter of interest which appears in the speeches made in the House of Lords is the caution expressed by Lord Thankerton and Lord Macmillan with regard to the limits of the doctrine that a foreign Sovereign cannot be impleaded in the Courts. Both Judges, while concurring in the result, made it clear that they reserved their opinion upon the more extreme applications of the doctrine of immunity. Lord Macmillan also took the opportunity of expressing in clear terms his adherence to the view that rules of international law can only be applied in

[1] An appeal from this judgment was dismissed by the House of Lords on February 8, 1939.

municipal courts in so far as they have been "adopted" by the Sovereign concerned.

The decision of Bennett, J., in *Haile Selassie* v. *Cable and Wireless, Ltd.*, upon which comment was made in the 1937 volume of the *Annual Survey*, has since been reversed by the Court of Appeal, [1938] 1 Ch. 889. The question at issue was purely one of procedure, the trial Judge having made an order staying the action on the ground that the effect of the proceedings would be to implead the King of Italy. The Court of Appeal reversed this order on the ground that the King of Italy was not in possession of the property in dispute, and the action could therefore proceed without impleading him. The substantial question between the dethroned Emperor and his Italian successor therefore remained to be determined. The case then went back to the trial Judge, who decided in favour of the plaintiff. In November Great Britain recognised the King of Italy as Emperor of Abyssinia, and it was upon this footing that the case was finally disposed of by the Court of Appeal in December ([1939] 1 Ch. 182). Applying the principle of succession the Court held that all the public rights of the plaintiff had vested in the King of Italy, and that the effect of the succession was retrospective to the date of *de facto* recognition.

The principle laid down in *The Cristina* was applied in favour of the Republican Government in the case of *The Neptuno*, 62 Ll. L. Rep. 7, the only additional point calling for notice being the decision of Langton, J., that possession was not lost by non-user. The learned Judge took the opportunity of expressing in very plain terms his desire that the contending Spanish parties would try to keep their disputes out of the English Court.

In the case of *Chung Chi Cheung* v. *R.*, [1939] A. C. 160, the Privy Council was called upon to determine the status of a foreign public vessel within British internal waters. The appellant, a British subject, had murdered the captain (also a British subject) of a Chinese customs cruiser lying in the port of Hong Kong. With the full consent of the Chinese authorities the murderer was tried and convicted in the Hong Kong Court. His appeal was based upon the untenable theory that a public ship is "a floating part of the territory" of the flag State, a picturesque metaphor which has unfortunately found its way into text-books of repute. In rejecting this doctrine the Judicial Committee rested its judgment upon the true

principle that the immunities ordinarily granted to foreign warships in port are analogous to the diplomatic immunities. They are not grounded upon any fiction of ex-territoriality, but upon the principle that one sovereign State does not exercise coercive jurisdiction over the public agencies of another within its territory. That being so, it follows that an immunity which has been waived by the Sovereign can no longer be pleaded by the individual.

LITERATURE

Annual Digest of Public International Law Cases. Years 1931 and 1932. Edited by H. Lauterpacht. London: Butterworth & Co. xlv and 464 pp. 40s.

The *Annual Digest* is now beyond praise: it is sufficient, therefore, simply to note that yet another volume has been added to this invaluable collection of international law materials, and that once again the editor is Professor Lauterpacht. This is the sixth volume of the series, and is in the familiar form, the cases being arranged under the heads of the topics with which they are concerned, so that one can turn immediately to the cases dealing with any given subject-matter. A welcome departure is the increase in the number of cases reported verbatim. There are some fifty digests, taken from decisions of the Permanent Court, Claims Commissions, Arbitral Tribunals, and a representative list of municipal courts. Included in the present volume are the important judgments of the Permanent Court in the cases of the *Free Zones of Upper Savoy and the District of Gex*, and the *Legal Status of the South-Eastern Territory of Greenland.*

R. Y. J.

The Test of the Nationality of a Merchant Vessel. By Robert Rienow. New York: Columbia University Press. 1937. 247 pp. 14s.

This is an inquiry directed towards answering the question, what is the proper test, according to international law, of the nationality of a merchant vessel? That question is rightly distinguished from the closely related problem of enemy character, and from requirements of municipal law in relation

to the assumption of any particular nationality. The many possible tests are examined in the light of the practice of States, particularly as evidenced in international conventions. The conclusion is one from which few will be found to differ, namely that, although the flag is *prima facie* evidence of nationality, the final criterion is to be found in the document of registration. The book contains some valuable material: indeed, the references are perhaps too profuse; there is no inherent sanctity in inverted commas, and unexceptionable propositions would appear with more grace and no less authority if couched in the author's own words than in phrases industriously culled from the writings of some other person who happens to have had occasion to say the same thing. There is also, perhaps, too much of what Historicus happily called breaking the butterfly on the wheel. However, though one may quarrel sometimes with the method of exposition, the gist of the work is a real contribution to the literature on this subject. It is a pity that Mr. Rienow was not able to use the very interesting material to be found in the report of the Co-ordination Committee appointed at the twenty-first session of the International Labour Conference, which came to very similar conclusions on the test of nationality.

R. Y. J.

Transactions of the Grotius Society. Vol. 23. London: Sweet & Maxwell. 1938. xxiv and 219 pp. 10s.

This latest volume of Grotius Society transactions contains the text of nine papers read before the Society during 1937. Of the more general papers, the first is a summary history of the machinery of federation as a factor for peace, by Dr. van Hamel. Judge Caloyanni discusses justiciable and political disputes, and recent proposals for supplementing the work of the Permanent Court. Dr. Schwarzenberger contributes an excellent analysis of Mr. Hull's Declaration of July 16, 1937, and of the replies of the Governments to which it was addressed. Dr. L. P. Jacks has a diverting but hardly constructive diatribe on the frailty of alliances. Of the more technical articles, Mr. Hales has an important contribution on some of the more difficult of the legal aspects of the mandates system, namely, sovereignty, nationality, termination, and transfer, whilst Mr. Iwi puts in a plea for an Imperial Privy Council as being a logical corollary of the Statute of Westminster. There are in addition two valuable articles on

private international law: Dr. Szladits tells us in a very lucid fashion of some of the more important features of Hungarian private international law, and Dr. Domke contributes a learned discussion on international loans and questions of conflict, dealing mainly with problems raised by the gold clause. Both these latter are contributions to the literature of comparative law.

R. Y. J.

The British Year Book of International Law. Vol. XIX. 1938. Humphrey Milford; Oxford University Press. vi and 316 pp. 16s.

The British Year Book is almost invariably of a high standard, but this is a particularly good number. There are seven principal articles. The first is a description of the history, importance, and administration of the International Settlement and the French Concession at Shanghai, by Sir John Pratt, and there can be few people more qualified to speak on this subject. There is a learned article which illumines the dark places of the problems of conflicts of jurisdiction in matrimonial suits, and it is sufficient to add that the writer is Professor Gutteridge. Professor Garner, whose recent death will be mourned by international lawyers everywhere, explains the meaning of the United States neutrality law of 1937. Professor Jenks has been paying special attention of late to the jurisprudence of the Permanent Court of International Justice, and in this number of the Year Book he examines the method and the occasions of the application and interpretation of municipal law by the Court. He believes that the time has come to make provisions in regard to this problem in the Statute and Rules of the Court. Mr. J. G. Starke discusses the meaning of the concept of imputability and its usefulness in the analysis of certain types of international delinquency. Dr. Friedmann is concerned with the growth of state control over the individual and its impact on the established doctrines of international law, such as state immunity before municipal Courts, and the laws of neutrality. The burden of his article is that fundamental changes in the very structure of society are taking place before our eyes and that international lawyers can no longer afford to ignore them: this is an important article. Finally, Mr. Brookfield makes a useful contribution to the solution of the vexed question of the immunities to be granted to the

subordinate personnel of diplomatic missions. There are, in addition, the usual notes on books and cases, and two special notes dealing with the abolition of the capitulations in Egypt and the Nyon Arrangement.

R. Y. J.

The British Year Book of International Law. Vol. XX, 1939. Humphrey Milford; Oxford University Press. vi and 249 pp. 16s.

A welcome change of policy has advanced the date of publication of the Year Book from August to April, thus enabling a very brief notice to be included in this *Survey* while the proofs are passing through the press. Of the six articles the longest is that by Mr. C. W. Jenks, who examines in detail the use made by English Courts of decisions in the Permanent Court of International Justice. The conclusion at which he arrives, subject to some reservations, is that our Courts ought to treat these decisions as authoritative. Professor Gutteridge discusses the technical and practical difficulties presented by the problem of unifying private law, and a posthumous article by the late Mr. Fachiri severely criticises the Paraguayan repudiation of the Optional Clause. Mr. Glanville Williams analyses the history of the doctrine of "hot pursuit", and Mr. R. Y. Jennings discusses the efforts made to deal with the problem of refugees, pointing out that the final solution can only be found either in repatriation or in naturalisation. An unsigned but authoritative article gives the fullest account which has yet been published of the complicated question of the capitulations in Morocco.

The notes, analysis of international and national decisions, and book reviews occupy somewhat more than half the volume. Professor Garner's death unfortunately made it impossible to include the account of American cases which he had contributed for many years.

H. A. S.

World Court Reports, Vol. III, 1932—1935. Edited by Manley O. Hudson and Ruth E. Bacon. 1938. xvi and 549 pp. (Carnegie Endowment, Washington.)

This is the only publication which presents the reports of the Permanent Court in a form which makes it possible to

include them in a private library. The only criticism which can be offered is that it is a pity that we should have to wait so long for each volume. The texts of the opinions are given in full, together with a sufficient statement of the facts of the case, and, indeed, all the material which the ordinary reader can reasonably require, but we are spared the intolerable prolixity of the official publications. In the period covered the Court delivered six judgments, three advisory opinions, and fourteen interim orders. Ten contentious cases were brought to the Bar, but four of these were settled out of Court. Of the cases included in this volume those dealing with East Greenland and freedom of navigation on the Congo (the *Oscar Chinn Case*) are the most interesting to the student of general principles of international law.

H. A. S.

The Law of Treaties. British Practice and Opinions. By Arnold Duncan McNair. Oxford: Clarendon Press. 1938. xxx and 578 pp. 30s.

About one-third of this book is text and about two-thirds quotation. The documents quoted are principally opinions of the law officers of the Crown in the nineteenth century, most of them dated before, but some after, 1885, the date to which the Foreign Office archives are open. The latter are printed by special leave of the Foreign Office given to the learned author. So far as it consists of these documents the book is, in its own department, a worthy successor of Chalmers' and Forsyth's Collections of Opinions. This is a type of legal literature, legitimised by Roman precedent, which is too rare in English law. The documents are reproduced with extreme accuracy and the copying is technically perfect. That is to say, the documents are, where possible, reproduced in full, and where this is not possible, the fact that the matter reproduced is not the whole is clearly shown. *O si sic omnes!* But nothing less, of course, was to be expected from Dr. McNair.

The text consists of a terse account of the line taken by British practice on every topic relating to the law and custom of treaty-making, treaty-keeping, and treaty-breaking. Though wholly objective, it is informed with a critical spirit. Comment on policy is scrupulously avoided. Though the primary purpose of the text is the modest one of connecting

the opinions and excerpts, it has independent value. The book will become a book of authority.

This time the Clarendon Press has printed a law book worthy of its general tradition in production. A little more generosity and latitude might have been shown in the spacing, on, for instance, pp. 344–5.

R. T. E. L.

INTERNATIONAL CONVENTIONS, TREATIES AND AGREEMENTS CONCLUDED BY GREAT BRITAIN

AIR NAVIGATION. — Exchange of Notes between His Majesty's Government in the United Kingdom and the Government of India and the Royal Siamese Government for the opening of regular air services over Siam and over India and Burma. Bangkok, December 3, 1937 (Treaty Series No. 11 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom, the Commonwealth of Australia and New Zealand and the French Government regarding Aerial Navigation in the Antarctic. Paris, October 25, 1938 (Treaty Series No. 73 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Italian Government supplementary to the Convention of December 7, 1934 (Treaty Series No. 2 [1935] [1]) regarding the Establishment of Air Transport Lines. Rome, December 14, 1937 (Treaty Series No. 15 [1938]).

Convention between His Majesty in respect of the United Kingdom and His Serene Highness the Regent of Hungary relating to Air Navigation. Budapest, March 22, 1937. Ratifications exchanged London, May 19, 1938 (Treaty Series No. 39 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Chinese Government regarding Air Services over China. Hankow, December 18, 1937 (Treaty Series No. 28 [1938]).

Agreement between His Majesty's Government in the Union of South Africa and the Portuguese Government for Air Services between South Africa and Portuguese East Africa. Pretoria, June 18, 1937 (Treaty Series No. 25 [1938]. Reprint of Union of South Africa Treaty Series No. 5 [1937]).

Exchange of Notes between the Government of the Irish Free State and the United States Government regarding

[1] *Annual Survey*, 1935, p. 324.

Air Navigation. Dublin, September 29/November 4, 1937 (Treaty Series No. 27 [1938]. Reprint of Irish Free State Treaty Series No. 3 [1937]).

AIR NAVIGATION: DOCUMENTS OF IDENTITY.—Exchange of Notes between His Majesty's Government in the United Kingdom, the Commonwealth of Australia, and New Zealand and the Government of India and the Government of Norway regarding Documents of Identity for Aircraft Personnel. Oslo, October 11, 1937 (Treaty Series No. 13 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Swiss Federal Council regarding Documents of Identity for Aircraft Personnel. Berne, May 17, 1938 (Treaty Series No. 65 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom, the Commonwealth of Australia and New Zealand and the Government of Sweden respecting Documents of Identity for Aircraft Personnel. Stockholm, May 30, 1938 (Treaty Series No. 58 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom, the Commonwealth of Australia, New Zealand and the Government of India and the Government of Belgium regarding Documents of Identity for Aircraft Personnel. Brussels, April 29, 1938 (Treaty Series No. 38 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Government of India and the French Government regarding Documents of Identity for Aircraft Personnel. Paris, July 15, 1938 (Treaty Series No. 5 [1939]).

AIR NAVIGATION: MISCELLANEOUS.—Exchange of Notes between the Governments of Canada and the United States of America recording an Agreement relating to Certificates of Air Worthiness for Exported Aircraft. Washington, July 28, 1938 (Treaty Series No. 7 [1939]. Reprint of Canadian Treaty Series No. 10 [1938]).

Agreement between His Majesty's Government in the Union of South Africa and the Government of the German Reich regarding the Reciprocal Recognition of Efficiency Certificates for Aircraft and Aircraft Motors. Cape Town, March 16, 1937 (Treaty Series No. 23 [1938]. Reprint of Union of South Africa Treaty Series No. 2 [1937]).

AIR NAVIGATION: TAXATION.—Exchange of Notes between

His Majesty's Government in the United Kingdom and the Swiss Government for the Reciprocal Exemption of Aircraft from Duties on Fuel and Lubricants. London, July 26, 1938 (Treaty Series No. 61 [1938]).

Agreement between His Majesty's Government in the United Kingdom and the Government of the German Reich regarding Exemption from Taxation of Certain Profits arising from Air Transport. Berlin, November 10, 1937 (Treaty Series No. 12 [1938]).

ARMAMENTS: LIMITATION. — Agreement between His Majesty's Government in the United Kingdom and the German Government providing for the Limitation of Naval Armaments and Exchange of Information concerning Naval Construction, with Declaration, Protocol of Signature and Exchange of Notes. London, July 17, 1937 (Treaty Series No. 2 [1938]). Ratifications exchanged in London, November 4, 1937.

Protocol modifying the Anglo-German Agreement (*supra*) of July 17, 1937, for the Limitation of Naval Armaments. London, June 30, 1938 (Treaty Series No. 56 [1938]).

Agreement between His Majesty's Government in the United Kingdom and the Polish Government providing for Limitation of Naval Armament and the Exchange of Information concerning Naval Construction, with Protocol of Signature and Exchange of Notes. London, April 27, 1938 (Treaty Series No. 1 [1939]). Ratifications exchanged November 22, 1938.

Protocol modifying the foregoing. London, July 27, 1938 (Treaty Series No. 2 [1939]).

Agreement between His Majesty's Government in the United Kingdom and the Government of the Union of Soviet Socialist Republics providing for the Limitation of Naval Armaments and the Exchange of Information concerning Naval Construction. With Protocol of Signature and Exchange of Notes of November 12/19, 1937, regarding the Russian text. London, July 17, 1937 (Treaty Series No. 17 [1938]). Ratifications exchanged in London, November 4, 1937.

Protocol between the United States of America, France and Great Britain modifying the Treaty of March 25, 1936 (Treaty Series No. 36 [1937] [2]) for the Limitation of Naval

[2] *Annual Survey*, 1937, p. 373.

Armament. London, June 30, 1938 (Treaty Series No. 48 [1938]).

BON VOISINAGE. — I. Agreement between the United Kingdom and Italy consisting of a Protocol with Annexes and Exchange of Notes; II. Bon Voisinage Agreement and Exchange of Notes between the United Kingdom, Egypt and Italy. Rome, April 16, 1938 (Treaty Series No. 31 [1938]).

Declaration by the Governments of the United Kingdom and Italy bringing into force the foregoing Protocol and annexed Agreements and Declarations. With Exchange of Notes with the Egyptian Government regarding Lake Tsana and the Suez Canal. Rome, November 16, 1938 (Treaty Series No. 6 [1939]).

BOUNDARIES.—Exchange of Notes between His Majesty's Government in the United Kingdom and the Portuguese Government regarding the Boundary between Tanganyika Territory and Mozambique. Lisbon, May 11, 1936, and December 28, 1937 (Treaty Series No. 14 [1938]).

Agreement between the Government of the United Kingdom and the Belgian Government regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi. London, November 22, 1934. Ratifications exchanged London, May 19, 1938 (Treaty Series No. 42 [1938]).

Treaty between His Majesty in respect of the United Kingdom and His Majesty the King of the Belgians regarding the Boundary between Tanganyika and Ruanda-Urundi. London, November 22, 1934. Ratifications exchanged London, May 19, 1938 (Treaty Series No. 41 [1938]).

BROADCASTING. — International Convention concerning the Use of Broadcasting in the Cause of Peace. Geneva, September 28, 1936 (Treaty Series No. 29 [1938]). His Majesty's ratifications in respect of the United Kingdom deposited August 18, 1937; of New Zealand, January 27, 1938; of India, August 11, 1937.

CIVIL PROCEDURE.—Convention between His Majesty in respect of the United Kingdom and His Majesty the King of the Hellenes regarding Legal Proceedings in Civil and Criminal Matters. London, February 27, 1936 (Treaty Series No. 5 [1938]). Ratifications exchanged at Athens, November 16, 1937.

COMMERCIAL RELATIONS: BILLS OF HEALTH.—Exchange

of Notes between the Government of India and the Government of French Indo-China for the Reciprocal Abolition of Consular Visas on Bills of Health. New Delhi, February 26, 1938; Calcutta, March 1, 1938 (Treaty Series No. 8 [1939]).

COMMERCIAL RELATIONS: INDUSTRIAL PROPERTY.—International Agreement regarding False Indications of Origin on Goods. London, June 2, 1934 (Treaty Series No. 54 [1938]). His Majesty's Ratification in respect of the United Kingdom deposited at London, June 30, 1938. Replaces Agreement of Madrid of April 14, 1891 (Treaty Series No. 18 [1892]); revised at Washington, June 2, 1911 (Treaty Series No. 7 [1913]), at The Hague, November 6, 1925 (Treaty Series No. 15 [1928]), and at London, June 2, 1934 (*infra*).

International Convention for the Protection of Industrial Property. London, June 2, 1934 (Treaty Series No. 55 [1938]). Ratifications in respect of the United Kingdom deposited at London, June 30, 1938.

COMMERCIAL RELATIONS: NATIVE LABOUR.—Exchange of Notes between His Majesty's Government in the Union of South Africa and the Portuguese Government modifying the Agreement of November 17, 1934 (Treaty Series No. 4 [1936] [3]) in regard to Native Labour from Mozambique. Lisbon, March 11, 14, 24/June 8, 1936 (Treaty Series No. 21 [1938]). Reprint of Union of South Africa Treaty Series No. 5 [1936]).

Exchange of Notes between His Majesty's Government in the Union of South Africa and the Portuguese Government extending and modifying the Agreement of November 17, 1934, concerning Native Labour from Mozambique. Lisbon, October 19/27, 1937 (Treaty Series No. 48 [1938]. Reprint of Union of South Africa Treaty Series No. 9 [1937]). Extends the foregoing.

COMMERCIAL RELATIONS: PAYMENTS.—Anglo-German Transfer Agreement. London, July 1, 1938 (Treaty Series No. 68 [1938]). Relates, *inter alia*, to the former Austrian debt.

Supplementary Agreement for the Execution of Article 2 of the foregoing. Berlin, August 13, 1938 (Treaty Series No. 70 [1938]).

Anglo-German Payments (Amendment) Agreement. With

[3] *Annual Survey*, 1936, p. 398.

Exchange of Letters between Representatives of the Governments of the United Kingdom and the German Reich regarding Negotiations for Mutual Trade Relations with Germany. London, July 1, 1938 (Treaty Series No. 69 [1938]). Amends Agreement of November 1, 1934.[4]

Supplementary Agreement to the Anglo-Roumanian Payments (Amendment) Agreement of May 27, 1937.[5] Bucharest, February 25, 1938 (Treaty Series No. 30 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Roumanian Government approving the foregoing. London, June 14/20, 1938 (Treaty Series No. 44 [1938]).

Agreement between His Majesty's Government in the United Kingdom and the Roumanian Government regarding Commercial Payments. Bucharest, September 2, 1938 (Treaty Series No. 57 [1938]).

Commercial Agreement between His Majesty's Government in the United Kingdom and the Italian Government modifying the Clearing Agreement of November 6, 1936, to replace the Commercial Agreement of the same date.[6] London, March 18, 1938 (Treaty Series No. 18 [1938]). Provides for Import Quotas.

Agreement between His Majesty's Government in the United Kingdom and the Italian Government modifying the [Clearing] Agreement of November 6, 1936,[7] regarding Commercial Exchanges and Payments (with Exchange of Notes (*infra*)). London, March 18, 1938 (Treaty Series No. 19 [1938]).

Exchange of Notes (*supra*). Rome, December 24, 1937 (Treaty Series No. 16 [1937]).

Agreement between His Majesty's Government in the United Kingdom and the Government of the Turkish Republic supplementary to the Agreement of September 2, 1936,[8] regarding Trade and Clearing (with agreed Minute). London, May 27, 1938 (Treaty Series No. 36 [1938]).

Payments Agreement between His Majesty's Government in New Zealand and the Government of the German Reich. Wellington, September 30, 1937 (Treaty Series No. 34 [1938]).

[4] Treaty Series, No. 26 [1935]; see *Annual Survey*, 1935, p. 333.
[5] Treaty Series, No. 30 [1938]; see *Annual Survey*, 1937, p. 378.
[6] Treaty Series, No. 2 [1937]; see *Annual Survey*, 1937, p. 377.
[7] Treaty Series, No. 3 [1937]; see *Annual Survey*, 1937, p. 377.
[8] Treaty Series, No. 25 [1936]; see *Annual Survey*, 1936, p. 395.

COMMERCIAL RELATIONS: TARIFF PREFERENCES, MOST-FAVOURED-NATION TREATMENT, ETC.—Commercial Agreement between His Majesty's Government in the United Kingdom and the Government of Cuba. With Protocol of Signature and Exchange of Notes regarding Navigation. Havana, February 19, 1937 (Treaty Series No. 67 [1938]). Ratifications exchanged at Havana, September 10, 1938.

Exchange of Notes between His Majesty's Government in the United Kingdom and the Governments of the Argentine Republic, Brazil and Uruguay regarding Regulation of Beef Imports. London, June 28, 1937, December 15, 1937, and January 6, 1939 (Treaty Series No. 11 [1939]).

Agreement between the Government of the United Kingdom and the Government of the Portuguese Republic Regulating the Commercial Relations between Swaziland, Basutoland and the Bechuanaland Protectorate and the Portuguese Colony of Mozambique. Lisbon, May 11, 1938 (Treaty Series No. 45 [1938]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Colombian Government regarding Prolongation of the Treaty of Friendship, Commerce and Navigation of February 16, 1866.[9] Bogota, December 30, 1938 (Treaty Series No. 13 [1939]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Polish Government regarding Customs Classifications of Certain Pneumatic Tyres. Warsaw, March 22, 1937 (Treaty Series No. 6 [1938]).

Convention between His Majesty in respect of the United Kingdom and the Emperor of Japan regarding Trade and Commerce between Burma and Japan (with Protocol of Signature). London, June 17, 1937 (Treaty Series No. 1 [1938]). Ratifications exchanged in London, December 8, 1937.

Exchange of Notes between His Majesty's Government in the United Kingdom and the Siamese Government for Temporary Continuance of Rights under the Treaties with Siam of July 14, 1925 (Treaty Series Nos. 7, 8 and 9 [1926]). Bangkok, November 13, 1937 (Treaty Series No. 32 [1938]). Transitional to the next Treaty.

Treaty of Commerce and Navigation between His Majesty's Government in respect of the United Kingdom and

[9] *Foreign Office Handbook of Commercial Treaties*, p. 118; Hertslet's *Commercial Treaties*, Vol. XII, p. 364.

His Majesty the King of Siam. With Protocol and Exchange of Notes. Bangkok, November 28, 1937 (Treaty Series No. 33 [1938]). Ratifications exchanged February 19, 1938.

Exchange of Notes between His Majesty's Government in the United Kingdom and the Chilean Government constituting a Temporary Commercial Agreement. Santiago, November 26, 1937 (Treaty Series No. 10 [1938]).

Exchange of Notes between His Majesty's Government in New Zealand and the Swiss Federal Council regarding Commercial Relations between New Zealand and Switzerland. Wellington, May 5, 1938 (Treaty Series No. 53 [1938]).

Commercial Agreement between His Majesty's Government in the Commonwealth of Australia and the Swiss Federal Council, with Exchange of Notes. Canberra, November 4, 1938; Berne, November 22, 1938 (Treaty Series No. 14 [1939]). Ratifications exchanged at Canberra, December 16, 1938.

Exchange of Notes between His Majesty's Government in Canada and the Brazilian Government regarding Commercial Relations. Ottawa, June 12, 1937 (Treaty Series No. 51 [1938]. Reprint of Canadian Treaty Series No. 6 [1937]).

Exchange of Notes between His Majesty's Government in Canada and the Guatemalan Government regarding Commercial Relations. Guatemala, September 28, 1937 (Treaty Series No. 50 [1938]. Reprint of Canadian Treaty Series No. 17 [1937]).

Exchange of Notes between His Majesty's Government in Canada and the Government of Salvador regarding Commercial Relations. San Salvador, November 2, 1937 (Treaty Series No. 52 [1938]. Reprint of Canadian Treaty Series No. 18 [1937]).

Treaty of Commerce between His Majesty in respect of the Commonwealth of Australia and the President of the Czechoslovak Republic, with Final Protocol and Exchange of Notes. Canberra, August 3, 1936; Prague, August 19, 1936 (Treaty Series No. 9 [1938]). Ratifications exchanged at Canberra on November 11, 1937.

Exchange of Notes between the Governments of the Union of South Africa and the Netherlands regarding Commerce and Navigation, with Procès Verbal. Cape Town, February 20, 1935 (Treaty Series No. 49 [1938]. Reprint of Union of South Africa Treaty Series No. 3 [1935]).

Exchange of Notes between His Majesty's Government in New Zealand and the Netherlands Government regarding Commercial Relations between New Zealand and the Netherlands. Sydney, December 22, 1937; Wellington, January 14, 1938 (Treaty Series No. 47 [1938]). (Relates to quota on certain imports to the Netherlands.)

Commercial Agreement between His Majesty's Government in the Union of South Africa and the Belgian Government. Pretoria, July 13, 1937 (Treaty Series No. 26 [1938]. Reprint of Union of South Africa Treaty Series No. 6 [1937]).

Commercial Agreement between His Majesty's Government in the Union of South Africa and the Government of the Czechoslovak Republic. Cape Town, January 27, 1937 (Treaty Series No. 22 [1938]. Reprint of Union of South Africa Treaty Series No. 1 [1937]).

Trade Agreement between His Majesty's Government in New Zealand and the Government of the German Reich. Wellington, September 30, 1937 (Treaty Series No. 35 [1938]).

Commercial Agreement between the Government of the Union of South Africa and the Government of the French Republic. Paris, February 11, 1935 (Treaty Series No. 59 [1938]. Reprint of Union of South Africa Treaty Series No. 1 [1935]).

Commercial Agreement between the Government of the Union of South Africa and the Government of the French Republic. Pretoria, August 27, 1935 (Treaty Series No. 60 [1938]. Reprint of Union of South Africa Treaty Series No. 9 [1935]).

Trade Agreement between His Majesty's Government in the Commonwealth of Australia and the Japanese Government. Canberra/Sydney, July 1, 1938 (Treaty Series No. 66 [1938]).

Commercial Agreement between His Majesty's Government in the Union of South Africa and the Italian Government, with Supplementary Exchange of Notes of January 23, 1936. Cape Town, May 21, 1935 (Treaty Series No. 20 [1938]. Reprint of Union of South Africa Treaty Series No. 5 [1935] and No. 1 [1936]). (Relates to tariff classifications.)

ECONOMIC REGULATION.—Declaration by His Majesty's Secretary of State for Foreign Affairs recording the Acceptance of a Recommendation by the International Rubber

Regulation Committee by the States parties to the Agreement of May 7, 1934 (Treaty Series No. 12 [1934] [10]) regarding the Production and Export of Rubber. London, October 6, 1938 (with revised text of Agreement) (Treaty Series No. 74 [1938]).

EXTRADITION.—Convention between His Majesty in respect of the United Kingdom, the Commonwealth of Australia and New Zealand and the Grand Duchess of Luxembourg supplementary to the Treaty of November 24, 1880 [11] regarding Extradition. Luxembourg, January 28, 1937 (Treaty Series No. 46 [1938]). Ratifications exchanged at Brussels, July 1, 1938.

FISHERIES: HALIBUT.—Convention between His Majesty in respect of the Dominion of Canada and the President of the United States of America for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Behring Sea. Ottawa, January 29, 1937 (Treaty Series No. 62 [1938]. Reprint of Canadian Treaty Series No. 9 [1937]). Ratifications exchanged at Ottawa, July 28, 1937.

FISHERIES: SALMON.—Convention between His Majesty in respect of the Dominion of Canada and the President of the United States of America regarding the Sockeye Salmon Fisheries in the Fraser River System. Washington, May 26, 1930 (Treaty Series No. 63 [1938]. Reprint of Canadian Treaty Series No. 10 [1937]). Ratifications exchanged at Washington, July 28, 1937.

JURISDICTION.—Exchange of Notes between His Majesty's Government in the United Kingdom and the Government of Siam regarding the Right of Evocation from Siamese Courts under the Treaty of July 14, 1925 (Treaty Series No. 7 [1926] [12]). Bangkok, November 23, 1937 (Treaty Series No. 4 [1939]).

JURISDICTION: CAPITULATIONS.—Convention between His Majesty's Government in respect of the United Kingdom and the President of the French Republic for the Abolition of Capitulations in Morocco and Zanzibar, with Protocol of Signature, Minute and Exchange of Notes. London, July 29, 1937 (Treaty Series No. 8 [1938]). Ratifications exchanged at Paris, December 1, 1937.

[10] *Annual Survey*, 1934, p. 290.
[11] Hertslet's *Commercial Treaties*, Vol. XV, p. 234.
[12] *Foreign Office Handbook of Commercial Treaties*, p. 594.

PASSPORTS.—Agreement between His Majesty's Government in the Union of South Africa and the United States Government for the Reduction of Non-Immigrant Passport Visa Fees. Cape Town, March 24, 1937 (Treaty Series No. 24 [1938]. Reprint of Union of South Africa Treaty Series No. 8 [1937]).

Exchange of Notes between His Majesty's Government in the United Kingdom and the Roumanian Government regarding the Acceptance of Seamen's Discharge Books in Lieu of Passports. London, December 6, 1937 (Treaty Series No. 7 [1938]).

REFRIGERATION.—International Agreement modifying the International Convention of June 21, 1920 (Treaty Series No. 6 [1923] [13]) for the establishment of an International Institute of Refrigeration. Paris, May 31, 1937 (Treaty Series No. 72 [1938]). Ratification in respect of the United Kingdom deposited on August 8, 1938.

REFUGEES.—Convention concerning the Status of Refugees coming from Germany concluded between Belgium, Great Britain, Denmark, Spain, France, Norway and the Netherlands. Geneva, February 10, 1938 (Treaty Series No. 8 [1939]). Ratification in respect of the United Kingdom deposited at Geneva, September 26, 1938.

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[13] Hertslet's *Commercial Treaties*, Vol. XXX, p. 296.
[14] *Annual Survey*, 1934, p. 292.

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